# (16,466.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1897.

No. 286.

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JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

*vs.*

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | *a* | 1 |
| Transcript from the circuit court of the United States for the eastern district of Texas | 1 | 1 |
| Caption, name and style of court, and names of parties | 1 | 1 |
| Plaintiff's original petition, filed January 25, 1893 | 1 | 2 |
| Citation for Christian Moerlein Brewing Company, issued January 25, 1893, with marshal's return thereon | 3 | 3 |
| Plaintiff's motion to have person appointed to serve process and order appointing Morgan M. Mann, filed January 30, 1893 | 4 | 4 |
| Citation for Christian Moerlein Brewing Company, issued February 1, 1893, with the return thereon | 5 | 4 |
| Citation for J. J. Dickerson, issued February 1, 1893, with the return thereon | 6 | 5 |
| Original answer of defendant The Christian Moerlein Brewing Company, filed February 22, 1893 | 7 | 6 |
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 9 | 8 |
| Original answer of J. J. Dickerson, filed February 21, 1893 | 14 | 11 |


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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 23, 1897.

| | Original. | Print. |
|---|---|---|
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 17 | 13 |
| Order from minutes setting case for trial, February 22, 1893 | 21 | 17 |
| Order from minutes for *subpœna duces tecum*, March 6, 1893 | 22 | 17 |
| Order from minutes granting leave to file first amended original answer, October 18, 1893 | 22 | 17 |
| First amended original answer of defendant The Christian Moerlein Brewing Company, filed October 18, 1893 | 23 | 17 |
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 29 | 22 |
| First amended original answer of defendant J. J. Dickerson, filed October 18, 1893 | 34 | 26 |
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 43 | 32 |
| Order from minutes granting continuance, October 26, 1893 | 48 | 37 |
| Order from minutes setting case, February 19, 1894 | 49 | 37 |
| Order from minutes granting continuance, March 23, 1894 | 49 | 37 |
| Order from minutes, continuance, October 20, 1894 | 49 | 37 |
| Order from minutes for *subpœna duces tecum*, February 20, 1895 | 50 | 38 |
| Order from minutes, leave to plaintiff to file a first amended original petition and a first supplemental petition, February 26, 1895 | 50 | 38 |
| First amended original petition, filed February 26, 1895 | 51 | 38 |
| Exhibit A—Account | 53 | 40 |
| First supplemental petition, filed February 26, 1895 | 68 | 49 |
| Order from minutes, leave granted plaintiff to file first amended supplemental petition, March 9, 1895 | 68 | 49 |
| Plaintiff's first amended supplemental petition, filed March 9, 1895 | 69 | 50 |
| Order from minutes, leave granted to defendants to file second amended original answers entered October 26, 1895 | 70 | 50 |
| Second amended original answer of defendant The Christian Moerlein Brewing Company, filed October 26, 1895 | 70 | 51 |
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 80 | 58 |
| Second amended original answer of defendant Dickerson, filed October 26, 1895 | 86 | 62 |
| Exhibit 1—Deed of Freiberg, Klein & Co. to Jacob Sonnentheil, December 16, 1892 | 97 | 70 |
| Order from minutes, 1st day's trial, entered October 30, 1895 | 102 | 74 |
| Appointing stenographer, Oct. 30, 1895 | 103 | 75 |
| 2d day's trial, entered October 31, 1895 | 104 | 75 |
| 3d day's trial, entered Nov. 1, 1895 | 104 | 75 |
| 4th day's trial, entered Nov. 2, 1895 | 104 | 76 |
| 5th day's trial, entered Nov. 4, 1895 | 105 | 76 |
| 6th day's trial, entered Nov. 5, 1895 | 105 | 76 |
| 7th day's trial, entered Nov. 7, 1895 | 106 | 77 |
| 8th day's trial, entered Nov. 8, 1895 | 106 | 77 |
| 9th day's trial, entered Nov. 9, 1895 | 107 | 77 |
| 10th day's trial, entered Nov. 11, 1895 | 107 | 78 |
| 11th day's trial, entered Nov. 12, 1895 | 107 | 78 |
| General charge asked by plaintiff and refused, filed November 13, 1895 | 108 | 78 |

| | Original. | Print. |
|---|---|---|
| Charges asked by plaintiff and refused, filed Nov. 13, 1895 | 109 | 79 |
| Charge No. 1, requested by defendants and refused, filed November 13, 1895 | 113 | 82 |
| Charge No. 2, requested by defendants and refused, filed November 13, 1895 | 114 | 83 |
| Charge No. 3, requested by defendants and refused, filed November 13, 1895 | 115 | 83 |
| Charge No. 3*a*, requested by defendants and refused, filed November 13, 1895 | 115 | 84 |
| Charge No. 3*b*, requested by defendants and refused, filed November 13, 1895 | 116 | 84 |
| Charge No. 4, requested by defendants and refused, filed November 13, 1895 | 117 | 85 |
| Charge No. 5, requested by defendants and refused, filed November 13, 1895 | 119 | 86 |
| Charge No. 6, requested by defendants and refused, filed November 13, 1895 | 120 | 87 |
| Charge of the court to the jury, filed November 13, 1895 | 121 | 88 |
| Judgment of the court from minutes, entered Nov. 13, 1895 | 130 | 95 |
| Plaintiff's motion for a new trial, filed November 14, 1895 | 131 | 95 |
| Order from minutes overruling motion for new trial, entered November 14, 1895 | 142 | 103 |
| Application of plaintiff to enlarge time for filing bills of exception, filed November 14, 1895 | 142 | 103 |
| Order enlarging time for filing bills of exception, entered November 14, 1895, from minutes | 143 | 104 |
| Plaintiff's bill of exceptions | 144 | 105 |
| Statement of evidence offered by plaintiff | 144 | 105 |
| Testimony of Theodore Himler | 146 | 106 |
| Jacob Sonnentheil | 152 | 110 |
| M. Lasker | 200 | 145 |
| A. W. Fly | 207 | 151 |
| B. Adoue | 208 | 151 |
| J. Lobit | 210 | 152 |
| J. N. Whalen | 212 | 154 |
| M. Marx | 213 | 155 |
| Statement of evidence offered by defendants | 215 | 156 |
| Charter and by-laws of Citizen's Loan Company of Galveston, Texas | 215 | 156 |
| Charter and by-laws of Island City Savings Bank of Galveston, Texas | 226 | 164 |
| By-laws of First National Bank of Galveston | 253 | 183 |
| Testimony of Moses Freiberg | 259 | 187 |
| L. A. Grelling | 273 | 197 |
| E. H. Gorse | 284 | 205 |
| Louis Werner | 291 | 210 |
| Louis Schneider | 295 | 213 |
| Cornelius Sampson | 295 | 213 |
| James Moore | 296 | 214 |
| H. C. Lange | 297 | 214 |
| L. S. McKinney | 298 | 215 |
| Charles Grumbach | 300 | 216 |
| W. B. King | 301 | 217 |

| | Original. | Print |
|---|---|---|
| Testimony of Frank Sterne | 303 | 218 |
| W. F. Beers | 304 | 219 |
| W. N. Stowe | 306 | 220 |
| Jacob Sonnentheil (recalled) | 308 | 222 |
| Leo N. Levi | 308 | 222 |
| John N. Whalen | 312 | 225 |
| Plaintiff's requests | 313 | 226 |
| Charge to the jury | 317 | 229 |
| Exceptions to charge | 326 | 235 |
| Verdict | 327 | 236 |
| Exception to judgment | 327 | 236 |
| Judge's certificate to bill of exceptions | 328 | 236 |
| Application for writ of error, filed January 28, 1896 | 328 | 237 |
| Assignment of errors, filed January 28, 1896 | 329 | 237 |
| Writ of error, filed January 30, 1896 | 351 | 253 |
| Citation, filed February 1, 1896 | 352 | 253 |
| Bond on writ of error, filed February 3, 1896 | 354 | 255 |
| Clerk's certificate | 356 | 256 |
| Writ of error | 356 | 257 |
| Citation | 358 | 258 |
| Hearing and submission | 360 | 259 |
| Judgment | 360 | 259 |
| Order granting leave to file petition for rehearing | 360½ | 259 |
| Petition for rehearing | 361 | 260 |
| Order denying petition for rehearing | 367 | 263 |
| Petition for writ of error | 368 | 263 |
| Assignment of errors | 370 | 265 |
| Bond on writ of error | 391 | 281 |
| Opinion | 394 | 283 |
| Clerk's certificate | 398 | 285 |
| Writ of error | 399 | 286 |
| Return on writ of error | 400 | 286 |
| Citation | 401 | 287 |
| Proof of service of citation | 402 | 287 |

a UNITED STATES OF AMERICA,
*Fifth Judicial Circuit.*

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, State of Louisiana, before the Honorable Don A. Pardee and the Honorable A. P. McCormick, United States circuit judges for the fifth judicial circuit, and the Honorable Emory Speer, United States district judge for the southern district of Georgia.

JACOB SONNENTHEIL
*v.*
THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON. } No. 472.

Be it remembered that heretofore, to wit, on the 26th day of February, 1896, a transcript of the record of the above-stated cause from the circuit court of the United States for the eastern district of Texas was filed in the office of the clerk of the United States circuit court of appeals for the fifth circuit and is in the words and figures following, to wit:

1 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON. } No. 1702, C. L.

Be it remembered, that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular October term of said court, to wit, on the 13th day of November, 1895, the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, presiding, the following proceedings were had and taken in said court, to wit:

*Plaintiff's Original Petition.*

Filed January 25th, 1893.

In the Circuit Court of the United States for the Eastern District of Texas, Sitting at Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON and Others. } No. 1702.

To the honorable the above-named court:

The petition of Jacob Sonnenthiel, who resides in the county of Galveston, and State of Texas, and who is a citizen of said State, plaintiff, against The Christian Moerlein Brewing Company, a corporation created by and existing under the laws of the State of Ohio, and a citizen of said State of Ohio, where also it has its domicile in Hamilton county, and of J. J. Dickerson, who is a citizen of the State of Texas, and resides in the county of Lamar, in said State, defendants, respectfully shows:

That heretofore, to wit: on the 23rd day of December, 1892, your petitioner was the lawful owner and possessor of, and had
2 good title to a large stock of goods, wares and merchandise, store fixtures, tools, implements, horses, mules, wagons and trucks, and harness and other personal property in the county of Galveston, all of which said property was then and there of the reasonable value of eighty-four thousand two hundred and seventy-three dollars and five cents ($84,273.05).

That on or about the said 23rd day of December, 1892, the said J. J. Dickerson then and there being the marshal of this honorable court and then and there acting as such by and through his deputy John H. Whalen and under a certain writ of attachment issued out of this honorable court in a certain suit therein pending and wherein the said The Christian Moerlein Brewing Company was plaintiff and Moses Freiberg, and Samuel Klein and Joseph Seinscheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co. were defendants, and being thereto directed and induced by the said The Christian Moerlein Brewing Company, forcibly seized and took all of the said property from the possession of your petitioner and without paying him any portion of the value thereof in any way. That by reason of the premises your petitioner has been damaged in the sum of one hundred thousand dollars.

That the said The Christian Moerlein Brewing Company, has an agent, agency and office and representative in the county of Galveston aforesaid, and that L. A. Grelling is the agent and representative of the said defendant The Christian Moerlein Brewing Company in and for said county of Galveston, where the said L. A. Grelling resides.

Wherefore petitioner p-ays for citation against the said defendants as in like cases is by law provided, and that upon hearing he have

judgment against the said defendants for his damages aforesaid, with interest and costs, and for such other and further legal relief as he may be entitled to.

SCOTT, LEVI & SMITH AND
WILLIE & BALLINGER,
*Att'ys for Plaintiff.*

Indorsements: "No. 1702. In the circuit court of the
3 United States for the eastern district of Texas. Jacob Sonnentheil *vs.* J. J. Dickerson *et al.* Plaintiff's original petition. Filed Jan'y 25th, 1893. C. Dart, clerk. Scott, Levi & Smith, Willie & Ballinger, att'ys for plaintiff."

*Citation for the Christian Moerlein Brewing Company.*

Issued January 25, 1893, and marshal's return thereon.

United States Circuit Court.

The President of the United States of America to the marshal or the eastern district of Texas, Greeting:

You are hereby commanded to summon the Christian Moerlein Brewing Company, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the twentieth (20th) day of February next, to answer the petition of Jacob Sonnentheil, filed January 25, 1893, cause No. 1702, against The Christian Moerlein Brewing Company and J. J. Dickerson, in an action of damages for wrongfully suing out attachment of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not, and due return of this writ make.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 25th day of January in the year of our Lord eighteen hundred and ninety-three and of American Independence the 117th year.

[SEAL.] C. DART, *Clerk*,
By W. L. HANSCOM, *Deputy*.

*Marshal's Return.*

Received this writ on the 25th day of January, 1893, and I executed the same on the 25th day of January, 1893, by delivering to the within-named defendant The Christian Moerlein Brewing
4 Co., through its agent, L. A. Grelling, at Galveston, in my district, in person, a true copy of this writ, and a copy of the petition certified by the clerk of this court.

J. J. DICKERSON,
*U. S. Marshal, Eastern District of Texas*,
By JOHN M. WHELAN, *Deputy*.

Indorsements: "C. L. No. 1702. Jacob Sonnentheil *vs.* Christian Moerlein Brewing Company *et al.* Issued 25th day of January, A. D. 1893. C. Dart, clerk. By W. L. Hanscom, deputy. Returned and filed 27th day of January, 1893. C. Dart, clerk. By Geo. H. Burnett, deputy.

*Plaintiff's Motion to Have Person Appointed to Serve Process.*

Filed January 30, 1893.

In the Circuit Court of the United States for the Eastern District of Texas, Sitting at Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON and Others. } No. —.

To the honorable judges of the above-mentioned court:

The plaintiff in this cause, J. Sonnentheil, shows unto your honors, that J. J. Dickerson, the marshal of this court is a party defendant in said cause and the said plaintiff asks that your honors appoint some disinterested person to whom writs and precepts in this cause shall be directed and who shall execute and return them, in accordance with section No. 922 of the Revised Statutes of the United States.

SCOTT, LEVI & SMITH AND
WILLIE & BALLINGER,
*Attorneys for Plaintiff.*

The clerk of the above-mentioned court will file the foregoing motion among the papers of the cause above indicated, and Morgan M. Mann, of Galveston, is hereby appointed as the person to whom writs and precepts in said cause shall be directed and who may execute and return them.

DAVID E. BRYANT,
*Judge of the Above-named Court.*

Indorsements: "No. 1702. J. Sonnontheil *vs.* J. J. Dickerson *et al.* Plaintiff's motion to have person appointed to serve process. Filed January 30th, 1893. C. Dart, clerk, by W. L. Hanscom, deputy. Scott, Levi & Smith and Willie & Ballinger, for plaintiff."

*Citation for the Christian Moerlein Brewing Company.*

Issued February 1st, 1893, and the return thereon.

United States Circuit Court.

The President of the United States of America to Morgan M. Mann, Greeting:

You are hereby commanded to summon the Christian Moerlein Brewing Company, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next

term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the 20th (twentieth) day of February, 1893, to answer the petition of Jacob Sonnentheil filed January 25th, 1893, cause No. 1702, against The Christian Moerlein Brewing Company and J. J. Dickerson, in an action of damages for wrongfully suing out writ of attachment, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not, and due return of this writ make.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 1st day of February, in the year of our Lord eighteen hundred and ninety-three, and of American Independence the 117th year.

[SEAL.] C. DART, *Clerk*,
By GEO. H. BURNETT, *Deputy*.

6 *The Return.*

Received this writ on the 2nd day of February, 1893, and I executed the same on the 3rd day of February, 1893, by delivering to the within-named defendant The Christian Moerlein Brewing Company a true copy of this writ and a copy of this petition of the plaintiff herein, certified by the clerk of this court. Said delivery was made in the county of Galveston, State of Texas, by delivering in said Galveston county said copy of this writ and said certified copy of plaintiff's petition to L. A. Grelling, the agent of the Christian Moerlein Brewing Company in and for said Galveston county, Texas.

MORGAN M. MANN.

Sworn to before me, Feb'y 22, 1893.
[SEAL.] C. DART, *Clerk*.

Indorsements: "C. L. No. 1702. Jacob Sonnentheil *vs.* J. J. Dickerson *et al.* Issued 1st day of Feb'y, A. D. 1893. C. Dart, clerk, by Geo. H. Burnett, deputy. Returned and filed 22d day of Feb'y, 1893. C. Dart, clerk."

*Citation for J. J. Dickerson, Defendant.*

Issued February 1st, 1893, with the return thereon.

United States Circuit Court.

The President of the United States of America to Morgan M. Mann, Greeting:

You are hereby commanded to summon J. J. Dickerson, if to be found in your district, to be and appear before the honorable circuit court of the United States, at the next term thereof, to be holden for the fifth judicial circuit, at the court-house thereof, in the city of Galveston, on Monday, the twentieth (20th) day of February, 1893,

to answer the petition filed by Jacob Sonnentheil filed January 25, 1893, cause No. 1702, against The Christian Moerlein Brewing Company and J. J. Dickerson, in an action of damages for wrongfully suing out writ of attachment, of which you will serve the said defendant with the accompanying copy of said petition.

Herein fail not, and due return of this writ make.

7 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 1st day of February, in the year of our Lord eighteen hundred and ninety-three, and of American Independence the 117th year.

[SEAL.] C. DART, *Clerk*,
By GEO. H. BURNETT, *Deputy*.

*The Return.*

Received this writ on the 2nd day of February, 1893, and I executed the same on the 8th day of February, 1893, by delivering to the within-named defendant, J. J. Dickerson, in person, a true copy — this writ and a copy of the petition, certified by the clerk of this court.

MORGAN M. MANN.

Sworn to before me, Feb'y 22d, 1893.
[SEAL.] C. DART, *Clerk*.

Indorsements: "C. L. No. 1702. Jacob Sonnentheil *vs.* J. J. Sickerson *et al.* Issued 1st day of February, 1893. C. Dart, clerk, by George H. Burnett, deputy. Returned and filed 22nd day of Feb'y, 1893. C. Dart, clerk."

*Original Answer of the Defendant, The Christian Moerlein Brewing Company.*

Filed February 21, 1893.

U. S. Circuit Court, Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said defendant The Christian Moerlein Brewing Company and says that the said petition is insufficient in law; and of this it prays judgment of the court.

2. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained, and says

8 that it is not guilty of the said supposed wrongs, injuries and trespasses, or any of them, in and by said petition charged against it; and of this it puts itself upon the country.

3. And for further plea in this behalf the said defendant says

that if it ever directed and induced its said codefendant, J. J. Dickerson, marshal of said court, to seize and take said property named in said petition, or any part thereof, from the possession of said plaintiff—which is not admitted, but denied—it did so lawfully with the sole intent and purpose of procuring its said codefendant to rightfully execute said writ of attachment named in said petition, as it was his duty as such marshal to do, and not otherwise; that such seizure and possession, if any, were made and taken by said marshal by virtue and in pursuance of a lawful and valid writ of attachment issued out of said court at the suit therein theretofore filed, No. 1693 on the docket of said court, of this defendant against said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co, to recover a large sum of money, to wit: $28,386.21, and legal interest, for which said Freiberg, Klein & Co. were, at the time of, before and ever since the filing of said suit against them have been, and now are, indebted to this defendant; that after the accrual of said indebtedness, and while this defendant was a creditor in and to the full amount thereof of said Freiberg, Klein & Co., the said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid comprising said firm, on December 16, 1893, with intent to delay, hinder and defraud their creditors, of whom this defendant was one, made and gave to said plaintiff an instrument in writing, purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including said debts to this defendant, and of paying over and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then
9 remain—the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to reproduce the original, said writing to be used in evidence on the trial hereof; that only by virtue of said instrument in writing did, or does, the plaintiff claim, or has he ever claimed that the property in said petition named was not subject to levy and seizure of and under said writ of attachment; that said instrument in writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof to delay, hinder and defraud their creditors of whom this defendant was one—and was accepted by said plaintiff with knowledge on his part and on the part of those named therein as preferred creditors, of said intent; and the said instrument was and is as to this defendant, a creditor as aforesaid, void, and interposed no lawful obstruction to the levy of said writ of attachment and the proceedings thereunder complained of; and this the said defendant is ready to verify. Wherefore it prays judgment, etc., etc.

LOVEJOY & SAMPSON AND
HUME & KLEBERG,
*Counsel for the Defendant The Christian Moerlein Brewing Co.*

EXHIBIT 1.

STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas we Moses Freiberg and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in the said State of Texas, partners doing business under the firm name and style of Freiberg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and manner hereinafter provided: Now, therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over and transferred and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer unto Jacob Sonnentheil, also of the said city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof, to wit: All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julien Freiberg, on the south side of Avenue B, or Strand street, in block No. 624, in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block No. 624 and fronting on Avenue C or Mechanic street, in said city, and also in the United States custom warehouse and storehouse in the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in, upon and about the premises aforesaid or any of them. Also all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description, belonging to us and situated or contained in or upon the premises aforesaid and used or kept for sale in or in connection with the business heretofore carried on by us upon said premises or any of them. Also, all and singular the ice boxes and faucets and cash register belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office and are herewith delivered to the said Jacob Sonnenthiel.

Also, fourteen head, more or less, of horses and mules, being all

the animals belonging to us and used in connection with and
11 in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B, or Strand St.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with our said business and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A, in the city and county of Galveston aforesaid, and comprising all the beer owned by us now contained in said building.

Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business, sold, shipped or delivered to our customers, or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open accounts or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of accounts and documents of every description pertaining to or containing evidence of such debts, claims and demands, or the transaction in which the same accrued.

Also, all and singular, the unexpired insurance contracts and policies hereto effected and still in force upon the property hereby conveyed, or any part thereof.

Also, all and singular, *as* our unexpired license as wholesale or retail dealers in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever, but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall be and he is hereby authorized and directed to take immediate and complete charge, posses-
12 sion and control of all and singular the property, assets and value and the evidences thereof hereinbefore mentioned and as speedily as possible sell and convey the said personal property in parcels or as an entirety at public or private sale, and collect the said debts, claims and demands and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in the execution of this trust, including the rent of premises the hire, pay and fee of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to be rendered in this behalf, and secondly the fol-

lowing debts owing by us, each in the order here set down and in full before those which come after:

| | |
|---|---|
| Amount owing to A. W. Fly, temporary admstr., about. | $3,913 91 |
| " owing to B. Kahn about..... | 1,598 60 |
| " owing to the Island City savings bank or other holder or holders and on acc't of our 4 certain promissory notes for the sum of $5,000 each and payable to the order of said bank..... | 20,000 00 |
| " owing one certain etc. etc. etc..... | 5,500 00 |
| Owing 1 certain etc. etc..... | 4,000 00 |
| " 5 certain etc. etc. 1st Nat. bank..... | 25,000 00 |
| " 3 certain etc. etc. Am. Nat. bank..... ..... | 15,000 00 |
| " 1 certain etc. etc. Am. Nat. bank.. ..... | 2,500 00 |
| " 2 certain etc. etc. Adoue & Lobit..... ..... | 10,000 00 |
| Owing 2 certain, etc., etc., Adoue & Lobit..... | 5,000 00 |
| " 2 certain, etc., etc., Citizens' Loan Co..... | 10,000 00 |
| " to G. Ketch or other holder and on acc't of our certain promissory note payable to order G. Ketch..... . ..... ..... | 5,000 00 |
| Amount owing to A. Lowenstein, etc., etc.... ..... | 3,000 00 |
| Amount owing to S. A. Walker, 3 certain notes, etc..... | 15,000 00 |
| Amount owing Irwing Nat. B'k of N. Y., etc..... | 15,000 00 |

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification. Other descriptive items when
13 given are from recollection and belief only, and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debts mentioned, whether such amounts be stated exactly or not, are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil in the order above given and stated; and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof, shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust, and no purchaser of any such property nor any debtor making payments to the said Jacob Sonnentheil shall stand charged to see to the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on p. 3rd before signing.)

In testimony of all of which we, the said Moses Freiberg and

Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this sixteenth day of December, A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before Jas. Spellaim.
Filed Dec. 16, '92.

A. WAKELEE.
H. C. JOHNSON, *Dep.*

Indorsements: "No. 1702. United States circuit court at Galveston, February term, 1893. Jacob Sonnentheil *v.* J. J. Dickerson, marshal, etc., *et al.* Original answer of defendant The
14 Christian Moerlein Brewing Co. Filed Feb'y 21, 1893. C. Dart, clerk. Lovejoy & Sampson and Hume & Kleberg, counsel for defendant."

*Original Answer of Defendant J. J. Dickerson.*

Filed February 21, 1893.

U. S. Circuit Court, Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said defendant, J. J. Dickerson, and says that the said petition is insufficient in law; and of this he prays judgment of the court.

2. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained, and says that he is not guilty of the said supposed wrongs, injuries and trespasses, or any of them, in and by said petition charged against him, and of this he puts himself upon the country.

3. And for further plea in this behalf the said defendant says that if he ever seized the property named in said petition, or any part thereof, and took it from the possession of said plaintiff—which is not admitted but denied—he did so under and in obedience to writs of attachments issued out of said court, directed to him as marshal thereof, and in the performance of his official duty as such marshal.

He shows—

That on December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein filed on that day, numbered 1693, by said The Christian Moerlein Brewing Company against Moses Freiberg, Samuel Klein and Joseph Seinsheimer as partners doing business under the firm name and style of Freiberg, Klein & Co. for $28,386.21 and legal interest, he levied on and took possession of a stock of goods in the store, and belonging to, and pointed out by

the agent of said brewing company as the property, of said Freiberg, Klein & Co.

15 That thereafter, on said December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed numbered 1694, by Teuscher & Co. against said Freiberg, Klein & Co. for $7,891.25 and legal interest, and at the instance of said Teuscher & Co. he attached said stock of goods, subject to said attachment of said brewing company.

That thereafter, on January 14, 1893, in pursuance of a writ of attachment issued out of said court on January 12, 1893, and directed to him as marshal aforesaid, in a certain suit for debt therein filed on said date last named, numbered 1700 by Anderson & Nelson Distilleries Company against said Freiberg, Klein & Co. for $2,430.20 and legal interest, and at the instance of said distilleries company, he attached said stock of goods, subject to said attachments of said brewing company and said Teuscher & Co.

That thereafter, on February 6, 1893, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed, numbered 1705, by Freiberg & Workum against said Freiberg, Klein & Co. for $10,000.00 and legal interest, and at the instance of said Freiburg & Workum, he attached said goods, subject to said attachments of said brewing company, and said Teuscher & Co., and said Anderson & Nelson Distilleries Company.

That by inventory of said goods, made in pursuance of said writs, the value thereof was fixed at the aggregate sum of $45,855.45.

That in pursuance of orders of sale of said goods they were in part sold for the sum of $49,013.72, and said sum paid into the registry of said court, where it now remains subject to the court's orders; and the remainder of said goods is now in the hands of this defendant under said orders, and subject to disposition in pursuance thereof.

That at and before the filing of said suits and the making of said levies under and by virtue of said writs of attachment said Freiberg, Klein & Co. were, and ever since have been, and now are, indebted to the said plaintiff therein, respectively, in the said respective sums in and by said suits sought to be recovered of them.

16 That after the accrual of said respective debts of said Freiberg, Klein & Co. to the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum, plaintiffs, respectively, in said suits numbered 1693, 1694, 1700 and 1705 and while said last-named parties were, respectively, creditors of said Freiberg, Klein & Co. in and to the full amounts by them, respectively, sought to be recovered in and by said suits, said Moses Freiberg, Samuel Klein, and Joseph Seinsheimer, partners as aforesaid, under the firm name and style of Freiberg, Klein & Co., on December 16, 1892, with intent to delay, hinder and defraud their creditors, of whom were the said plaintiffs in said numbered suits, respectively, made and gave to said plaintiff herein, Jacob Sonnentheil, as instrument in writing, purporting to

bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including the said several debts, or any of them, to plaintiffs, or any of them, in said numbered suits and of paying over and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain—the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to produce the original said writing to be used in evidence on the trial hereof.

That only by virtue of said instrument in writing did or does the plaintiff herein claim, or has he ever claimed, that said property in said petition named was not subject to levy and seizure of and under said writs of attachment.

That said instrument in writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof to delay, hinder and defraud their creditors—of whom were the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiburg & Workum—and was accepted by said plaintiff with knowledge on his part, and on
17 the part of those named therein as preferred creditors, of said intent, and the said instrument was and is as to said omitted creditors, and as to each of them, void, and interposed no lawful obstruction to levy of said writs of attachment, or any of them, and the proceedings thereunder had or complained of.

And this the said defendant is ready to verify.

Wherefore, he prays judgment, etc., etc.

LOVEJOY & SAMPSON AND
HUME & KLEBERG,
*Counsel for Defendant J. J. Dickerson.*

EXHIBIT 1.

STATE OF TEXAS, )
*County of Galveston.* )

Know all men by these presents, that whereas we, Moses Freiberg and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in said State of Texas, partners doing business under the firm name and style of Freiberg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and manner hereinafter provided. Now, therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we, the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set

over and transferred and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer, unto Jacob Sonnentheil, also of the said city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof, to wit:

All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julien Freiberg, on the south side of Avenue B, or Strand street, in block No. 624, in the said city of Galveston, and also in the
18 warehouse rented by us from George Seeligson, in said block No. 624, and fronting on Avenue C, or Mechanic street, in said city, and also in the United States custom warehouse and storehouse in the said city of Galveston, the said stock of goods, wares and merchandise, consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers in, upon and about the premises aforesaid or any of them.

Also, all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description, belonging to us, and situated or contained in or upon the premises aforesaid, and used or kept for sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular, the ice boxes and faucets and cash register, belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office, and are herewith delivered to the said Jacob Sonnentheil.

Also, fourteen head, more or less, of horses and mules, being all the animals belonging to us and used in connection with and in the the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B, or Strand street.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with out said business and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A, in the city and county
19 of Galveston aforesaid, and comprising all the beer owned by us now contained in said building.

Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business, sold, shipped or delivered to our customers, or any of them, but which

may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims, and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open account or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of accounts and documents of every description pertaining to or containing evidence of such debts, claim-, and demands, or the transaction in which the same accrued.

Also, all and singular, the unexpired insurance contracts and policies hereto effected and still of force upon the property hereby conveyed or any part thereof.

Also, all and singular *as* our unexpired license as wholesale or retail de*lea*rs in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall, and he is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular, the property, assets and value, and the evidences thereof hereinbefore mentioned, and as speedily as possible sell and convey the said personal property in parcels or as an entirety at public or private sale, and collect the said debts, claims and demands, and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in the execution of this trust, including the rent of premises, the hire, pay and fee of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to be rendered in this behalf, and secondly the following debts owing by us, each in the order here set down and in full before those which come after.

| | |
|---|---|
| Amount owing to A. W. Fly, temporary admst*y*., about | $3,913 91 |
| " owing to B. Kahn, about | 1,598 60 |
| " owing to the Island City savings bank or other holders and on acc't of our 4 certain promissory notes for the sum of $5,000 each and payable to order of said bank | 20,000 00 |
| " owing 1 certain etc. etc. etc. | 5,500 00 |
| Owing 1 certain etc. etc. | 4,000 00 |
| " 5 certain etc. etc. 1st Nat. bank | 25,000 00 |
| " 3 certain etc. etc. Am. Nat. bank | 15,000 00 |
| " 1 certain etc. etc. Am. Nat. bank | 2,500 00 |
| " 2 certain etc. etc. Adoue & Lobit | 10,000 00 |
| " 2 certain etc. etc. Adoue & Lobit | 5,000 00 |
| " 2 certain etc. etc. Citizens' Loan Co | 10,000 00 |

Owing to G. Ketch or other holder and on acc't of our certain promissory note payable to order G. Ketch... 5,000 00
Amount owing to A. Lowenstein etc. etc..... 3,000 00
Amount owing to S. A. Walker, 3 certain notes etc..... 15,000 00
Amount owing Irwing Nat. B'k of N. Y., etc.. .... .. 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification, other descriptive items when given are from recollection and belief only and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debts mentioned, whether such amounts be stated exactly or not, are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil in the order above given and stated;
21 and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof, shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust and no purchaser of any such property nor any debtor making payments to the said Jacob Sonnentheil shall stand charged to see the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on p. 3rd before signing.)

In testimony of all of which we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this sixteenth day of December, A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before Jas. Spellaim.
Filed Dec. 16, 1892.

A. WAKALEE.
H. C. JOHNSTON, *Dep.*

Indorsements: "No. 1702. United States circuit court, at Galveston. February term, 1893. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, etc., *et al.* Original answer of J. J. Dickerson. Filed Feb'y 21, 1893. C. Dart, clerk, by W. L. Hanscom, deputy. Lovejoy & Sampson and Hume & Kleberg, counsel for defendant."

*Order from Minutes Setting Case for Trial.*

Entered February 22, 1893 (vol. 7, p. 335).

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., 1702.

Ordered that this case be set for March 14, 1893.

22 *Order from Minutes for Subpœna Duces Tecum.*

Entered March 6, 1893 (vol. 7, p. 358).

J. SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. & J. J. DICKERSON. } 1702.

Upon application of the defendants, it is ordered that *subpœnas duces tecum* issue to require the attendance of the following-named persons to testify as witnesses in this case, and to bring with them the following documents, books, etc., to wit:

E. H. Gorse, and "to bring with him the last report of the late firm of Freiberg, Klein & Co. made to him as manager of the R. G. Dunn & Co.'s mercantile agency, as to their financial standing."

J. Z. Tate, and "to bring — him the last report of the late firm of Freiberg, Klein & Co. made to him as manager of the Bradstreet mercantile agency, as to their financial standing."

Joseph Seinsheimer, and "to bring with him the books of Freiberg, Klein & Co., relating to their business, kept for one year prior to December 16, 1892."

Jacob Sonnentheil, and "to bring with him books kept by him as trustee, or assignee of Freiburg, Klein & Co., since December 16, 1892."

The said subpœnas to be made returnable on the 14th day of March, 1893, at 10 o'clock a. m.

*Order from the Minutes Granting Leave to File First Amended Original Answer.*

Entered October 18, 1893 (vol. 7, p. 508).

J. SONNE-THEIL
*vs.*
CHRISTIAN MOERLEIN BREWING CO. } C. L., 1702.

Upon application leave is granted the defendant, The Christian Mo-rlein Brewing Co. to file a first amended original answer.

23 Upon like application, leave was granted the defendant J. J. Dickerson, to file a first amended original answer.

*First Amended Original Answer of Defendant The Christian Moerlein Brewing Company.*

Filed Oct. 18, 1893.

U. S. Circuit Court, Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said defendant The Christian Moerlein Brewing Company, and, with leave of court, files this its first amended original answer, in lieu of its original answer filed herein February 21, 1893, and says that the said petition is insufficient in law; and of this it prays judgment of the court.

2. And specially excepting thereto, the said defendant says that the said petition is insufficient in law—in that it does not particularly describe, nor in any manner sufficiently indicate, identify, or inform defendant of, the kind, quality, quantity or value of the goods, wares and merchandise and other property charged to have been wrongfully seized and taken by said defendant Dickerson; and of this it prays judgment of the court.

3. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained and says that it is not guilty of the said supposed wrongs, injuries and trespasses, or any of them, in and by said petition charged against it; and of this it puts itself upon the country.

4. And for further plea in this behalf the said defendant says—

That if it ever directed or induced its said codefendant, J. J. Dickerson, marshal of said court, to seize and take said property named in said petition, or any part thereof, from the possession of said plaintiff—which is not admitted, but denied—it did so lawfully with the sole intent and purpose of procuring its said codefendant to rightfully execute said writ of attachment named in said petition, as it was his duty as such marshal to do, and not otherwise.

24 That such seizure and possession, if any, were made and taken by said marshal by virtue and in pursuance of a lawful and valid writ of attachment issued out of said court at the suit therein theretofore filed, No. 1693 on the docket of said court, of this defendant against said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co., to recover a large sum of money, to wit:—$28,386.21, and legal interest, for which said Freiberg, Klein & Co., were, before and at the time of the filing of said suit, and have been ever since, and now are, indebted to this defendant.

That after the accrual of said indebtedness, and while this defendant was a creditor in and to the full amount thereof of said Freiberg, Klein & Co., the said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid comprising said firm, on

December 16, 1892, with intent to delay, hinder and defraud their creditors, and especially this defendant, made and gave to said plaintiff an instrument in writing, purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including said debts to this defendant, and of paying over and delivering to said Freiberg, Klein & Co., or their assignees, such balance of said property, or proceeds, as should then remain, the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to produce the original, said writing to be used in evidence on the trial hereof.

That only by virtue of said instrument in writing did, or does, the plaintiff claim, or has he ever claimed, that the property in said petition named was not subject to levy and seizure of and under said writ of attachment.

That said instrument of writing was given, as aforesaid, with the purpose and intent on the part of said makers thereof, to delay, hinder and defraud their creditors, of whom this defendant was one, and was accepted by said plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and the said intent of said makers of said instrument was then and there well known to those named therein as preferred creditors.

That the said instrument was and is as to this defendant, a creditor as aforesaid void, and interposed no lawful obstruction to the levy of said writ of attachment and the proceedings thereunder complained of.

And this said defendant is ready to verify.

Wherefore, it prays judgment, etc., etc.

5. And for further plea in this behalf the said defendant says:

That if it ever directed or induced its said codefendant, J. J. Dickerson, marshal of said court to seize and take said property named in said petition, or any part thereof, from the possession of said plaintiff—which is not admitted, but denied—it did so lawfully, with the sole intent and purpose of procuring its said codefendant to rightfully execute said writ of attachment named in said petition, as it was his duty as such marshal to do, and not otherwise.

That such seizure and possession, if any, were made and taken by said marshal by virtue and in pursuance of a lawful and valid writ of attachment issued out of said court at the suit therein theretofore filed No. 1693 on the docket of said court, of this defendant against said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, as partners doing business under the firm name and style of Freiburg, Klein & Co., to recover a large sum of money, to wit, $28,386.21, and legal interest, for which said Freiberg, Klein & Co. were, before and at the time of the filing of said suit, and have been ever since, and now are, indebted to this defendant.

That after the accrual of said indebtedness, and while this defend-

ant was a creditor in and to the full amount thereof of said Freiberg, Klein & Co., the said Moses Freiburg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid comprising said firm, on December 16, 1892, being then insolvent, with intent to delay, hinder and defraud their creditors, and especially this defendant, made and gave to said plaintiff an instrument in writing, purporting
26 to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including said debts to this defendant, and of paying over and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain—the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to produce the original — said writing to be used in evidence on the trial hereof.

That only by virtue of said instrument in writing did, or does, the plaintiff claim, or has he ever claimed, that the property in said petition named was not subject to lêvy and seizure of and under said writ of attachment.

That said instrument of writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof, who were then insolvent, to delay, hinder and defraud their creditors, of whom this defendant was one, and was accepted by said plaintiff with knowledge on his part of the said insolvency of the makers thereof and of their said intent to thereby delay, hinder and defraud their creditors, and the said insolvency and intent of said makers of said instrument was then and there well known to those names therein as preferred creditors.

That the said instrument was and is fraudulent and void as to the creditors as aforesaid of said makers thereof, and was made with the intent to delay, hinder and defraud said creditors, in that—among other things:

First. It vests in the said plaintiff, trustee therein named, the power and discretion to sell said property for cash or upon credit.

Second. It vests in said trustee the power and discretion to sell said property in parcels or as an entirety, at public or private sale.

Third. It vests in said trustee the power and discretion to remove from the reach of creditors the whole of said property, by sale thereof on time for negotiable promissory notes, and the sale of such notes to good-faith purchasers for value.

27 Fourth. It vests in said trustee the power and discretion to prolong indefinitely the execution of said trust.

Fifth. It charges said property with the burden of counsel fees throughout the whole period employed by said trustee, in his discretion, in executing said trust.

Sixth. It conveys to the said trustee to secure debts, the character, terms, conditions and amounts of which are not disclosed, a large amount of property, including all debts, demands, notes and ac-

counts due to the said makers thereof, and conceals the value of said property, and the character, terms, conditions, and amounts of said debts, demands, notes and accounts, so conveyed.

Seventh. It conveys to said trustee property already sold, shipped and delivered by the makers thereof and that may be thereafter acquired by them.

Eighth. The makers of said instrument did not upon the execution and delivery thereof, nor afterwards, deliver to said trustee, nor did he receive of them, the exclusive possession of said property; nor did said trustee then, or afterwards, assume exclusive ownership, management, control or direction of said property in accordance with the terms of said instrument; nor did the said makers then, or afterwards, withdraw themselves from said property and the direction, management and disposition thereof.

Ninth. The makers of said instrument, shortly prior to, and in anticipation of the execution thereof, and with the formed intent to thereby delay, hinder and defraud their said creditors, being insolvent and knowing themselves to be so, and for the purpose of establishing a false credit, with their creditors, and especially with said brewing company and enabling themselves thereby to make greater purchases of goods, and obtain greater credit from their said creditors, and especially from said brewing company, to wit: on or about October 12, 1892, falsely and fraudulently represented to Bradstreet's and Dun's commercial agencies in said city of Galveston, and to said brewing company, that they were solvent, and owned and possessed unexempt and available property of the net worth and value of $208,425, over and above all their liabilities, and thereby, with said fraudulent intent, procured themselves to
28 be falsely rated on the lists of said agencies as owning and possessing unexempt and available property of said net value, in excess of all liabilities, of $208,425.

Said commercial agencies were and are operated for the purpose of procuring and reporting to all those engaged in commercial business the true financial condition and standing of others so engaged, and its reports were and are received as correct and constitute the principal basis upon which credits are extended by and to those so engaged.

Misleading and deceiving said brewing company by said rating so procured and coming to its knowledge in the usual course, and by said false representations made to it, the said makers of said instrument purchased of said company, — the said company sold and delivered to them, on credit, during the months of October, November and December, 1892, a large quantity of valuable goods, greatly exceeding in quantity and value, the latter aggregating $—, former purchases so made during like periods, and upon similar representations other excessive purchases were made by them of other dealers.

Tenth. The makers of said instrument conveyed to said trustee property largely in excess of the amount of the debts thereby secured, with the fraudulent intent to realize said excess in money for their own account and remove it from the process available to

their said creditors, and thereby to delay, hinder and defraud said creditors.

Eleventh. The makers of said instrument had, prior to the execution thereof, secured by other property and by the indorsements of solvent third parties, the debts of the persons named as beneficiaries therein, and by said instrument devoted said property therein named to the further security of said persons, with the fraudulent intent of covering and removing it from the reach of other said creditors and of thereby delaying, hindering and defrauding said creditors.

Twelfth. The makers of said instrument, contemporaneously with, or immediately prior, or subsequent to the execution thereof, conveyed by deeds to L. Fellman, the father-in-law of said Seinsheimer, a large quantity of real estate in said Galveston county and
29 elsewhere, upon feigned considerations and really in secret trust to him to hold for their account, for the purpose of removing said real estate from the process available to their said creditors and protect it from them, and with intent to delay, hinder and defraud them.

And the matters of said plea said defendant is ready to verify. Wherefore he prays judgment, etc., etc.

LOVEJOY & SAMPSON AND
HUME & KLEBERG,
*Counsel for Defendants.*

EXHIBIT 1.

STATE OF TEXAS,
*County of Galveston.*

Know all men by these presents, that whereas we Moses Freiburg, and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in said State of Texas, partners doing business under the firm name and style of Freiburg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and manner hereinafter provided; now therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we, the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over and transferred, and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer, unto Jacob Sonnentheil, also of the said city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof: to wit:—

All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to

Julien Freiberg, on the south side of Avenue B or Strand
30 street, in block No. 624, in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block No. 624 and fronting on Avenue C or Mechanic street, in said city, and also in the United States custom warehouse and storehouse in the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in, upon and about the premises aforesaid or any of them.

Also, all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description, belonging to us, and situated or contained in or upon the premises aforesaid and used or kept for sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular, the ice boxes and faucets and cash registers, belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office and are herewith delivered to the said Jacob Sonnentheil.

Also, fourteen head, more or less, of horses and mules, being all the animals belonging to us and used in connection with and in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B or Strand St.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with our said business and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A in the city and county of Galveston aforesaid, and comprising all the beer owned by us now contained in said building.

31 Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business, sold, shipped or delivered to our customers, or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open account, or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of account

and documents of every description pertaining to or containing evidence of such debts, claims and demands, or the transaction in which the same accrued.

Also, all and singular the unexpired insurance contracts and policies heretofore effected and still of force upon the property hereby conveyed or any part thereof.

Also, all and singular *as* our unexpired license as wholesale or retail dealers in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever, but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall and he is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets, and value and the evidences thereof hereinbefore mentioned and as speedily as possible sell and convey the said personal property in parcels or as an entirety, at public or private sale, and collect the said debts, claims and demands and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in the execution of this trust, including the rent of premises, the hire, pay and fee of *said* servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to
32 be rendered in this behalf, and secondly the following debts owing by us, each in the order here set down and in full before those which come after.

| | |
|---|---|
| Amount owing to A. W. Fly, temporary administrator, about | $3,913 91 |
| Amount owing to B. Kahn, about | 1,598 60 |
| Amount owing to the Island City savings bank, holder or holders and on account of our four (4) promissory notes for the sum of $5,000.00 each and payable to the order of said bank | 20,000 00 |
| Amount owing to the Island City savings bank or other holder and on account of our certain promissory note for the sum of $5,500, payable to the order of said bank | 5,500 00 |
| Amount owing to the Island City savings bank or other holder and on account of our certain promissory note, payable to the order of said bank for | 4,000 00 |
| Amount owing to the First National of Galveston or other holder or holders, and on account of our five (5) certain promissory notes payable to the order of said bank, each for the sum of $5,000.00 | 25,000 00 |
| Amount owing to the American National Bank of Galveston, Texas, or other holder or holders and on account of our three (3) certain promissory notes, each for the sum of $5,000.00, and payable to the order of said bank | 15,000 00 |

Amount owing to the said American National bank or other holder and on account of our certain promissory note payable to the order of said bank for the sum of.. 2,500 00

Amount owing to Adoue & Lobit of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000 and discounted with said Adoue & Lobit..... 10,000 00

Amount owing to said Adoue & Lobit or other holder and on account of our two (2) certain promissory notes — for the sum of $2,500.00 and discounted with said Adoue & Lobit..... 5,000 00

Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000.00 payable to the order of the said Citizens' Loan Company..... 10,000 00

Amount owing to G. Ketch or other holder and on account of our certain promissory note payable to the order of said G. Ketch for the sum of.... .. ..... 5,000 00

33 Amount owing to Mrs. A. Lowenstein or other holder and on account of our certain promissory note payable to the order of the said Mrs. A. Lowenstein for the sum of..... .... 3,000 00

Amount owing to S. A. Walker, or other holder or holders and on account of our three certain promissory notes each for the sum of $5,000, payable to the order of ourselves..... 15,000 00

Amount owing to the Irwing National Bank of New York or other holder or holders of and on acc't of our three (3) certain promissory notes each for the sum of $5,000, payable to the order of said bank..... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification, other descriptive items when given are from recollection and belief only and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debt mentioned, whether such amounts be stated exactly or not are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil in the order above given and stated; and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him shall pass to the purchaser or purchasers thereof by absolute title, and shall

be discharged from the further operation of this trust and no purchaser of any such property nor any debt making payments to the said Jacob Sonnentheil shall stand charged to see to the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on p. 3d before signing.)

34 In testimony of all of which we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this sixteenth day of December, A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before Jas. Spillain.
Filed Dec. 16, '92.

A. WAKELEE.
H. C. JOHNSTON, *Deputy.*

Indorsements: "No. 1702. United States circuit court, at Galveston. Jacob Sonnentheil *v.* J. J. Dickerson, marshal, *et al.* First amended original answer of defendant The Christian Moerlein Brewing Company. Filed Oct. 18, 1893. C. Dart, clerk. Lovejoy & Sampson, Hume & Kleberg, counsel."

*First Amended Original Answer of Defendant J. J. Dickerson.*

Filed Oct. 18, 1893.

U. S. Circuit Court, Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said J. J. Dickerson, and, with leave of court, files this his first amended original answer, in lieu of his original answer filed herein February 21, 1893, and says that the said petition is insufficient in law; and of this he prays judgment of the court.

2. And specially excepting thereto, the said defendant says that the said petition is insufficient in law—in that it does not particularly describe, nor in any manner sufficiently indicate, identify, or inform defendant of, the kind, quality, quantity or value of the goods, wares and merchandise and other property charged to have been wrongfully seized and taken by him; and of this he prays the judgment of the court.

35 3. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained, and says that he is not guilty of the said supposed wrongs, injuries or trespasses, or any of them, in and by said petition charged against him; and of this he puts himself upon the country.

4. And for further plea in this behalf the said defendant says that if he ever seized the property named in said petition, or any part thereof, and took it from the possession of said plaintiff—which is not admitted but denied—he did so under and in obedience to writs of attachment issued out of said court, directed to him as marshal thereof, and in the pursuance of his official duty as such marshal.

He shows:

That on December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein filed on that day, numbered 1693, by the said Christian Moerlein Brewing Company against Moses Freiberg, Samuel Klein and Joseph Seinsheimer as partners doing business under the firm name and style of Freiberg, Klein & Co., for $28,386.21 and legal interest, he levied on and took possession of a stock of goods in the store, and belonging to, and pointed out by the agent of said brewing company as the property of said Freiberg, Klein & Co.

That thereafter, on said December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed numbered 1694, by Teuscher & Co. against said Freiberg, Klein & Co. for $7,891.25 and legal interest, and at the instance of said Teuscher & Co. he attached said stock of goods, subject to said attachment of said brewing company.

That thereafter on January 14, 1893, in pursuance of a writ of attachment issued out of said court on January 12, 1893, and directed to him as marshal aforesaid, in a certain suit for debt therein filed on said date last named, numbered 1700, by Anderson & Nelson Distilleries Company against said Freiberg, Klein & Co. for $2,430.20 and legal interest, and at the instance of said distilleries company, he attached said stock of goods, subject to said
36 attachment of said brewing company and said Teuscher & Co.

That thereafter, on February 6, 1893, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed, numbered 1705, by Freiberg & Workum against said Freiberg, Klein & Co. for $10,000.00 and legal interest, and at the instance of said Freiberg & Workum he attached said goods, subject to said attachment of said brewing company, and said Teuscher & Co., and said Anderson & Nelson Distilleries Company.

That by inventory of said goods, made in pursuance of said writs, the value thereof was fixed at the aggregate sum of $45,855.45.

That in pursuance of orders of sale of said goods they were sold for the sum of $51,229.91 and said sum paid into the registry of said court, where it now remains subject to the court's orders, less the sum of $— paid out for account of costs and expenses, under the court's orders.

That at and before the filing of said suits and the making of said levies under and by virtue of said writs of attachment said Frei-

berg, Klein & Co., were and ever since have been, and now are, indebted to the said plaintiffs therein, respectively, in the said respective sums in and by said suits sought to be recovered of them.

That after the accrual of said respective debts of said Freiberg, Klein & Co. to said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company, and Freiburg & Workum, plaintiffs, respectively, in said suits numbered 1693, 1694, 1700 and 1705, and while said last-named parties were, respectively, creditors of said Freiberg, Klein & Co., in and to the full amounts by them, respectively, sought to be recovered in and by said suits, said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid, under the firm name and style of Freiberg, Klein & Co., on December 16, 1892, with intent to delay, hinder and defraud their creditors, of whom were the said plaintiffs in said numbered suits, respectively, made and gave to said
37 plaintiff herein, Jacob Sonnentheil, an instrument in writing, purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including the said several debts, or any of them, to plaintiffs, or any of them, in said numbered suits, and of paying over and delivering to said Freiburg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain—the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to produce the original said writing to be used in evidence on the trial hereof.

That only by virtue of said instrument in writing did or does the plaintiff herein claim, or has he ever claimed, that said property in said petition named was not subject to levy and seizure of, and under said writs of attachment.

That said instrument in writing was given, as aforesaid, with the purpose and intention on the part of the said makers thereof to delay, hinder and defraud creditors, of whom were the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum, and was accepted by said plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and the said intent of said makers of said instrument was then and there well known to those named therein as preferred creditors, and the said instrument was and is as to said omitted creditors, and as to each of them, void, and interposed no lawful obstruction to levy of said writs of attachment, or any of them, and the proceedings thereunder had or complained of. And this the said defendant is ready to verify.

Wherefore he prays judgment, etc., etc.

5. And for further plea in this behalf the said defendant says that if he ever seized the property named in said petition, or any part

thereof, and took it from the possession of said plaintiff—which is not admitted, but denied—he did so under and in obedience
38 to writs of attachment issued out of said court, directed to him as marshal thereof, and in the performance of his official duty as such marshal.

He shows:—

That on December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein filed on that day, numbered 1693, by said The Christian Moerlein Brewing Company against Moses Freiberg, Samuel Klein and Joseph Seinsheimer as partners doing business under the firm name and style of Freiberg, Klein & Co., for $28,386.21 and legal interest, he levied on and took possession of a stock of goods in the store, and belonging to, and pointed out by the agent of said brewing company as the property of said Freiberg, Klein & Co.

That thereafter, on said December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed numbered 1694, by Teuscher & Co., against said Freiberg, Klein & Co., for $7,891.25 and legal interest, and at the instance of said Teuscher & Co., he attached said stock of goods, subject to said attachment of said brewing company.

That thereafter, on January 14, 1893, in pursuance of a writ of attachment issued out of said court on January 12, 1893, and directed to him as marshal as aforesaid, in a certain suit for debt therein filed on said date last named, numbered 1700, by Anderson & Nelson Distilleries Company against said Freiberg, Klein & Co., for $2,430.20 and legal interest, and at the instance of said distilleries company, he attached said stock of goods, subject to said attachment of said brewing company and said Teuscher & Co.

That thereafter, on February 6, 1893, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed, numbered 1705, by Freiberg & Workum against said Freiberg, Klein & Co., for $10,000.00 and legal interest, and at the instance of said Freiberg & Workum he attached said goods, subject to said attachments of said brewing company, and said Teuscher & Co. and said Anderson & Nelson Distilleries Company.

39 That by inventory of said goods, made in pursuance of said writs, the value thereof was fixed at the aggregate sum of $45,855.45.

That in pursuance of orders of sale of said goods they were sold for the sum of $51,229.91, and said sum paid into the registry of said court, where it now remains subject to the court's orders less the sum of $— paid out for account of costs and expenses under the court's orders.

That at and before the filing of said suits and the making of said levies under and by virtue of said writs of attachment said Freiberg, Klein & Co. were, and ever since have been, and now are, in-

debted to the said plaintiffs therein, respectively, in the said respective sums in and by said suits sought to be recovered of them.

That after the accrual of said respective debts of said Freiberg, Klein & Co. to said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum, plaintiffs, respectively, in said suits numbers 1693, 1694, 1700 and 1705, and while said last-named parties were, respectively, creditors of said Freiberg, Klein & Co. in and to the full amounts by them, respectively, sought to be recovered in and by said suits, said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid, under the firm name and style of Freiberg, Klein & Co., on December 16, 1892, being then insolvent, with intent to delay, hinder and defraud their creditors, of whom were the said plaintiffs in said numbered suits, respectively, made and gave to said plaintiff herein, Jacob Sonnentheil, an instrument in writing purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including the said several debts, or any of them, to plaintiffs, or any of them, in said numbered suits, and of paying over and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain—the particulars of said writing appearing from a substantial copy thereof hereto attached and made part hereof for certainty, marked Exhibit 1, and the plaintiff is now notified to produce the original said writing to be use in evidence on the trial hereof.

That only by virtue of said instrument in writing did or does the plaintiff herein claim, or has he ever claimed that said property in said petition named was not subject to levy and seizure of and under said writs of attachment.

That said instrument in writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof, who were then insolvent, to delay, hinder and defraud their creditors, of whom were the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum, and was accepted by said plaintiff with knowledge on his part of the said insolvency of the makers thereof and of their said intent to delay, hinder and defraud their creditors, and the said insolvency and intent of the said makers of said instrument were then and there well known to those named in said instrument as preferred creditors.

That the said instrument was and is fraudulent and void as to the creditors as aforesaid of said makers thereof, and was made with the intent to delay, hinder and defraud said creditors, in that—among other things:

First. It vests in the said plaintiff, trustee therein named, the power and discretion to sell said property for cash or upon credit.

Second. It vests in said trustee the power and discretion to sell

said property in parcels, or as an entirety, at public or private sale.

Third. It vests in said trustee the power and discretion to remove from the reach of creditors the whole of said property, by sale thereof on time for negotiable promissory notes, and the sale of such notes to good-faith purchasers for value.

Fourth. It vests in said trustee the power and discretion to prolong indefinitely the execution of said trust.

Fifth. It charges said property with the burden of counsel fees throughout the whole period employed by said trustee, in his discretion, in executing said trust.

41 Sixth. It conveys to the said trustee to secure debts, the character, terms, conditions and amounts of which are not disclosed, a large amount of property, including all debts, demands, notes and accounts due to the said makers thereof, and conceals the value of said property, and the character, terms, conditions and amounts of said debts, demands, notes and accounts, so conveyed.

Seventh. It conveys to said trustee property already sold, shipped and delivered by the makers thereof and that may be thereafter acquired by them.

Eighth. The makers of said instrument did not upon the execution and delivery thereof, nor afterwards, deliver to said trustee, nor did he receive of them the exclusive possession of said property; nor did said trustee then, or afterwards, assume exclusive ownership, management, control or direction of said property in accordance with the terms of said instrument; nor did said makers then, or afterwards, withdraw themselves from said property and the direction, management and disposition thereof.

Ninth. The makers of said instrument, shortly prior to, and in anticipation of the execution thereof, and with the formed intent to thereby delay, hinder and defraud their said creditors, being insolvent and knowing themselves to be so, and for the purpose of establishing a false credit with their creditors, and especially with said brewing company, and enabling themselves thereby to make greater purchases of goods, and obtain greater credit, from their creditors, and especially from said brewing company, to wit: on or about October 12, 1892, falsely and fraudulently represented to Bradstreet's and Dun's commercial agencies in said city of Galveston, and to said brewing company, that they were solvent, and owned and possessed unexempt and available property of the net worth and value of $208,425 over and above all their liabilities, and thereby, with said fraudulent intent, procured themselves to be falsely rated on the lists of said agencies as owning and possessing unexempt and available property of said net value, in excess of all liabilities, of $208,425.

42 Said commercial agencies were and are operated for the purpose of procuring and reporting to all those engaged in commercial business the true financial condition and standing of others so engaged; and its reports were and are received as correct and constitute the principal bases upon which credits are extended by and to those so engaged.

Misleading and deceiving said brewing company by said rating so procured and coming to its knowledge in the usual course, and by said false representations made to it, the said makers of said instrument purchased of said brewing company, and said brewing company sold and delivered to them, on credit, during the months of October, November and December, 1892, a large quantity of valuable goods, greatly exceeding in quantity and value, the latter aggregating $—, former purchases so made during like periods; and upon similar representations other excessive purchases were made by them of other dealers.

Tenth. The makers of said instrument conveyed to said trustee property largely in excess of the amount of the debts thereby secured, with the fraudulent intent to realize said excess in money for their own account and remove it from the process available to their said creditors, and thereby to delay, hinder and defraud said creditors.

Eleventh. The makers of said instrument had, prior to the execution thereof, secured by other property and by the endorsement of solvent third parties, the debts of the persons named as beneficiaries therein, and by said instruments devoted said property therein named to the further security of said persons, with the fraudulent intent of covering and removing it from the reach of other said creditors and of thereby delaying, hindering and defrauding said creditors.

Twelfth. The makers of said instrument contemporaneously with or immediately prior or subsequent to the execution thereof, conveyed by deeds to L. Fellman, the father-in-law of said Seinsheimer, a large quantity of real estate in said Galveston county and elsewhere, upon feigned considerations, but really in secret trust to him to hold for their account, for the purpose of removing said real estate from the process available to their said creditors, and protect it from them, and with intent to delay, hinder and defraud them.

43 And the matters of said plea said defendant is ready to verify. Wherefore, he prays judgment, etc., etc.

LOVEJOY & SAMPSON AND
HUME & KLEBERG,
*Counsel for Defendant.*

EXHIBIT 1.

STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas we Moses Freiberg, and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in said State of Texas, partners doing business under the firm name and style of Freiberg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and

manner hereinafter provided; now therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we, the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over and transferred, and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer, unto Jacob Sonnentheil, also of the said city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof, to wit:

All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julien Freiberg, on the south side of Avenue B or Strand street, in block No. 624, in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block No. 624 and fronting on Avenue C or Mechanic street, in said city, and also in the United States customs warehouse and storehouse in
44 the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in, upon and about the premises aforesaid or any of them.

Also, all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description belonging to us, and situated or contained in or upon the premises aforesaid and used or kept for sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular, the ice boxes and faucets and cash register, belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office and are herewith delivered to the said Jacob Sonnentheil.

Also, fourteen head, more or less, of horses and mules, being all the animals, belonging to us and used in connection with and in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B or Strand street.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with our said business and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A, in the city and county of Gal-

veston aforesaid, and comprising all the beer owned by us now contained in said building.

Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business,
45 sold, shipped or delivered to our customers, or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open account or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of account and documents of every description pertaining to or containing evidence of such debts, claims and demands, or the transaction in which the same accrued.

Also, all and singular the unexpired insurance contracts and policies heretofore effected and still of force upon the property hereby conveyed or any part thereof.

Also, all and singular *as* our unexpired license as wholesale or retail dealers in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever, but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall and he is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets, and value and the evidences thereof hereinbefore mentioned and as speedily as possible sell and convey the said personal property in parcels or as an entirety, at public or private sale, and collect the said debts, claims and demands and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in the execution of this trust, including the rent of premises, the hire, pay and fee of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to be rendered in this behalf, and secondly the following debts owing by us, each in the order here set down and in full before those which come after.

46 Amount owing to A. W. Fry, temporary administrator about..... $3,913 91

Amount owing to B. Kahn about..... 1,598 60

Amount owing to the Island City savings bank, holder or holders and on account of our four (4) certain promissory notes for the sum of $5,000.00 each and payable to the order of said bank..... 20,000 00

Amount owing to the Island City savings bank or other holder and on account of our certain promissory note for the sum of $5,500, payable to the order of said bank..... 5,500 00

Amount owing to the Island City savings bank, or other holder and on account of our certain promissory note, payable to the order of said bank for..... 4,000 00

Amount owing to the First National Bank of Galveston or other holder or holders, and on account of our five (5) certain promissory notes, payable to the order of said bank, each for the sum of $5,000.00..... 25,000 00

Amount owing to the American National Bank of Galveston, Texas, or other holder or holders and on account of our three (3) certain promissory notes, each for the sum of $5,000.00, and payable to the order of said bank..... 15,000 00

Amount owing to the said American National bank or other holder and on account of our certain promissory note payable to the order of said bank for the sum of..... 2,500 00

Amount owing to Adoue & Lobit, of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000 and discounted with said Adoue & Lobit..... 10,000 00

Amount owing to said Adoue & Lobit or other holder and on account of our two (2) certain promissory notes each for the sum of $2,500.00 and discounted with said Adoue & Lobit..... 5,000 00

Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000, payable to the order of the said Citizens' Loan Company..... 10,000 00

47 Amount owing to C. Ketch or other holder and on account of our certain promissory note, payable to the order of said C. Ketch for the sum of.... 5,000 00

Amount owing to Mrs. A. Lowenstein or other holder and on account of our said promissory note payable to the order of the said Mrs. A. Lowenstein for the sum of..... 3,000 00

Amount owing to S. A. Walker, or other holder or holders and on account of our three promissory notes each for the sum of $5,000, payable to the order of ourselves..... 15,000 00

Amount owing to Irwing National Bank of New York or other holder or holders of and on account of our three (3) certain promissory notes each for sum of $5,000, payable to the order of said bank..... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures

set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification, other descriptive items when given are from recollection and belief only and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debt mentioned, whether such amounts be stated exactly or not are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil in the order above given and stated; and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust, and no purchaser of any such property nor any debt-making payments to the said Jacob Sonnentheil shall stand charged to see to the ap-
48 plication of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on page 3rd before signing.)

In testimony of all of which we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this 16th day of December, A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before James Spillain.
Filed December 16, '92.

A. WAKELEE.
H. C. JOHNSTON, *Deputy.*

Indorsements: "No. 1702. United States circuit court at Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal *et al.* First amended original answer of defendant, J. J. Dickerson. Filed October 18, 1893. Lovejoy & Sampson, Hume & Kleberg, counsel."

*Order: Continuance.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 26, 1893.

J. SONNENTHEIL
*vs.*
CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day came the parties to this suit by their attorneys and thereupon came on to be heard the motion and affidavit of the plaintiff for a continuance, and the said motion having been heard and argued and the same being deemed by the court sufficient, it is ordered that the case be continued.

49 *Order Setting Case.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, February term, February 19th, 1894.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. }

Ordered, that this case be set for February 28th, 1894.

*Order: Continuance.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, February term, March 23, 1894.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., 1702.

Continued by defendants; this done February 28, 1894, and entered *nunc pro tunc.*

*Order: Continuance.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 20th, 1894.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.* } C. L., 1702.

Continued upon application of defendants.

50 *Order for Subpœnas Duces Tecum.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, February term, February 20th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.* } C. L., No. 1702.

Upon application of the defendants by their attorneys, it is ordered that *subpœnas duces tecum* issue for George Henderson, manager of the mercantile agency of R. G. Dun & Co., and that he appear and bring with him the last report of the late firm of "Freiberg, Klein & Co." made to the manager of the R. G. Dun & Co. mercantile agency as to their financial standing, and for H. A. Griffin, manager of the Bradstreet agency and to bring with him the last report of the late firm of "Freiberg, Klein & Co." made to the manager of the Bradstreet mercantile agency as to their financial standing.

*Order: Leave to Pl'ff to File a 1st Amended Orig. Petition and a 1st Supplemental Petition.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, February term, February 26th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

Upon application, leave is granted the plaintiff to file a first amended original petition, and a first supplemental petition.

51 *Plaintiff's Amended Original Petition.*

Filed Feb'y 26, 1895.

In the United States Circuit Court for the Eastern District of Texas, Sitting at Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON and Others. } No. 1702.

Now comes the plaintiff Jacob Sonnentheil in the above styled and numbered cause, and with leave of the court files this his first amended original petition in lieu of his original petition filed herein on January 25th, 1893, as follows:

In the Circuit Court of the United States for the Eastern District of Texas, Sitting at Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON and Others. } No. 1702.

To the honorable the above-named court:

The petition of Jacob Sonnentheil, who resides in the county of Galveston, and State of Texas, and who is a citizen of said State, plaintiff, against The Christian Moerlein Brewing Company, a corporation created by and existing under the laws of the State of Ohio, and a citizen of said State of Ohio, where also it has its domicile in Hamilton county, and of J. J. Dickerson, who is a citizen of the State of Texas, and resides in the county of Lamar, in said State, defendants, respectfully shows:

That heretofore, to wit: on the 23rd day of December, 1892, your petitioner was the lawful owner and possessor of, and had good title to a large stock of goods, wares and merchandise, store fixtures, tools, implements, horses, mules, wagons and trucks, and harness, and other personal property in the county of Galveston, all of which said property was then and there of the reasonable value of eighty-four thousand two hundred and seventy-three dollars and five cents, ($84,273.05), an itemized list of which said property, giving
52 the particular items thereof and the value of said items, is hereto attached, marked Exhibit A, and made part of this petition.

That on or about the said 23rd day of December, 1892, the said J. J. Dickerson then and there being the marshal of this honorable court and then and there acting as such by and through his deputy John H. Whelan and under a certain writ of attachment issued out of this honorable court in a certain suit therein pending wherein the said The Christian Moerlein Brewing Company was plaintiff and Moses Freiberg, and Samuel Klein & Joseph Seinsheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co., were defendants, and being thereto directed and induced by the said The Christian Moerlein Brewing Company forcibly seized and took all of the said property from the possession of your petitioner and without paying him any portion of the value thereof in any way. That by reason of the premises your petitioner has been damaged in the sum of one hundred thousand dollars.

That the said The Christian Moerlein Brewing Company has an agent, agency and office and representative in the county of Galveston aforesaid, and that L. A. Grelling is the agent and representative of the said defendant The Christian Moerlein Brewing Company in and for said county of Galveston where the said L. A. Grelling resides.

Wherefore, petitioner prays for citation against the said defendants as in like cases is by law provided, and that upon hearing he have judgment against the said defendants for his damages afore-

said, with interest and costs and for such other and further relief as he may be entitled to.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Attorneys for Plaintiff.*

53 EXHIBIT A.

| | | | | | | |
|---|---|---|---|---|---|---|
| 33 bbls. | R. Monarch whiskey | 1,318.50 | galls. | a. | 2.25 | 2,966.62 |
| 1 " | Bloom of Youth whiskey | 45 | " | a. | 1.35 | 60.75 |
| 2 " | Reynolds M. D. Co. 1890 | 83.32 | " | a. | 1.60 | 133.31 |
| 8 " | Ky. Club sp'g '89 | 319.43 | " | a. | 2.50 | 798.57 |
| 11 " | " fall '89 | 412.87 | " | a. | 2.25 | 928.95 |
| 11 " | Astor sp'g '89 | 447.78 | " | a. | 2.60 | 1,164.22 |
| 1 " | whiskey M. D. Co. | 43.43 | " | a. | 1.60 | 69.48 |
| 6 " | " M. C. D. Co. | 138.54 | " | a. | 1.40 | 193.95 |
| 23 " | Sweetwood '89 | 869.94 | " | a. | 2.25 | 1,956.86 |
| 41 " | Belle of Anderson sp'g '90 | 1,754.42 | " | a. | 2.25 | 3,997.45 |
| 6 " | Sunnyside rye " '89 | 234.09 | " | a. | 2.50 | 585.22 |
| 4 " | Shufeldt " " '90 | 165.42 | " | a. | 1.70 | 281.21 |
| 4 " | whiskey M. D. Co. " '91 | 155.02 | " | a. | 1.60 | 248.03 |
| 14 " | Kellar whiskey | 718.35 | " | a. | 1.75 | 1,257.10 |
| 15 " | whiskey 90% | 722.45 | " | a. | 1.40 | 1,011.43 |
| 10 " | " 100% | 421.57 | " | a. | 1.60 | 674.50 |
| 8 " | " 90% | 366.28 | " | a. | 1.40 | 512.79 |
| 3 " | alcohol | 142½ | " | a. | 2.55 | 363.37 |
| 4 " | spirits | 189 | " | a. | 2.55 | 481.95 |
| 1 " | Belle of Anderson wh'y | 42.33 | " | a. | 2.25 | 95.25 |
| 1 " | California brandy | 27.29 | " | a. | 2.50 | 68.22 |
| 1 " | whiskey M. C. D. Co. | 25.44 | " | a. | 1.60 | 40.70 |
| 1 " | blackberry brandy | 47 | " | a. | 1.00 | 47.00 |
| 1 " | Sunnybrook whiskey | 53 | " | a. | 2.75 | 145.75 |
| 1 " | barley malt " | 140½ | " | a. | 1.75 | 245.87 |
| 2 " | Monarch " | 86.49 | " | a. | 2.25 | 194.60 |
| 1 keg 1.00 | 10 galls. alcohol | | | a. | 2.55 | 26.50 |
| 1 " 1.00 | 15 " gin | 1,515 | " | a. | 1.75 | 27.60 |
| ½ bbl. gin | ½ bbl. 1.50 | 27 | " | a. | 1.50 | 42.00 |
| 2–8 casks | Sazzeras brandy | | | a. | 6.50 | 310.70 |
| 1 bbl. | Queen City whiskey | 47½ | " | a. | 1.40 | 66.50 |
| 13–2 " | California brandy | 344.62 | " | a. | 2.50 | 861.55 |
| 4–2 " | 6.00 alcohol | 97.$\frac{85}{100}$ | " | a. | 2.55 | 255.76 |
| 5–8 casks | 8.75 gin 2 st | 107.35 | " | a. | 1.75 | 196.60 |
| 1–8 " | Sazzara brandy | 22.22 | " | a. | 6.50 | 144.30 |
| 5 bbls. | white-corn wh'y | 237.41 | " | a. | 4.60 | 429.85 |
| | Forward | | | | | 20,884.51 |

54 Amount forward 20,884.51

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 bbl. | Robertson Co. whiskey | 40.40 | galls. | a. | 2.50 | 101 |
| 3 " | Sunnyside rye | 118.11 | " | a. | 2.50 | 295.27 |
| 11 " | Robertson Co. whiskey | 459.44 | " | a. | 2.50 | 1,148.85 |
| 3 " | white-corn whiskey | 141.76 | " | a. | 1.60 | 226.81 |
| 2 " | Woodland " '86 | 79.56 | " | a. | 3.00 | 238.68 |
| 8 " | Baker's rye | 368 | " | a. | 3.50 | 1,288 |
| ½ " | 1.50 American brandy | 23.64 | " | a. | 1.75 | 42.87 |
| ½ " | 1.50 whiskey Bowen | 22.05 | " | a. | 2.25 | 51.11 |
| ½ " | Irish whiskey Batjer | 14.82 | " | a. | 6.00 | 88.92 |
| ½ " | apple brandy ½ bbl. 1.50 | 18 | " | a. | 1.50 | 28.50 |
| 1–8 cask | " O. D. C. | 15½ | " | a. | 6.00 | 93 |
| 1 bbl. | peach brandy Waltes | 44 | " | a. | 2.50 | 160.00 |
| 1–8 cask | 1.75 gin 2 st | 18.18 | " | a. | 1.75 | 33.56 |
| 4 " | white-corn wh'y | 181.79 | " | a. | 1.60 | 290.85 |
| 1 " | old malt 1881 | 24 | " | a. | 2.00 | 48.00 |
| 1 bbl. | bitters | 44 | " | a. | 1.25 | 55 |
| ½ " | 1.50 brandy | 13½ | " | a. | 1.50 | 21.75 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 bbl. | whiskey | 25 | galls. | a. | 1.40 | 35 |
| 1 " | apple brandy | 18 | " | a. | 1.50 | 27 |
| 1 " | gin | 11 | " | a. | 1.40 | 15.40 |
| 1 " | rum | 36½ | " | a. | 1.75 | 63.87 |
| 1 " | whiskey 100% | 30 | " | a. | 1.50 | 45 |
| 1 " | bitters | 22 | " | a. | 1.25 | 27.50 |
| 1 " | gin | 26 | " | a. | 1.25 | 32.50 |
| 4 " | whiskey 100% | 192½ | " | a. | 1.60 | 308 |
| 3 " | " 90% | 140 | " | a. | 1.40 | 196 |
| 3 " | blackberry brandy | 143 | " | a. | 1.00 | 143 |
| 2 " | whiskey 100% | 95 | " | a. | 1.60 | 152 |
| 1 " | Woodland '86 | 23½ | " | a. | 3.00 | 70.50 |
| 1 " | whiskey M. C. D. Co | 38 | " | a. | 1.40 | 53.20 |
| 2 " | apple brandy | 87.45 | " | a. | 2.50 | 218.62 |
| ½ " | imported " | 12½ | " | a. | 6.50 | 81.25 |
| 2 " | Astor '86 | 67.16 | " | a. | 3.25 | 218.27 |
| 1 " | N. E. rum | 38½ | " | a. | 2.00 | 77 |
| 1 " | T. J. Monarch '86 | 20.80 | " | a. | 3.00 | 62.40 |
| | Forward | | | | | 26,923.19 |
| 55 | Amount f'w'd | | | | | 26,923.19 |
| 1 bbl. | prune juice | 35 | galls. | a. | 1.35 | 47.25 |
| 1 " | R. Monarch | 37.96 | " | a. | 2.25 | 85.41 |
| 1 " | Robertson County wh'y | 29½ | " | a. | 2.50 | 73.75 |
| 1 " | Sun-yside rye | 35.70 | " | a. | 2.50 | 89.25 |
| ½ " | whiskey 1884 | 23 | " | a. | 4.00 | 92 |
| 2-8 cask | imported gin | 42½ | " | a. | 5.00 | 212.50 |
| 3-8 " | " brandy | 59.41 | " | a. | 6.00 | 356.46 |
| 1-8 " | St. Croix rum | 9.04 | " | a. | 5.50 | 49.72 |
| 1-8 " | Scotch whiskey | 9½ | " | a. | 5.50 | 52.25 |
| 1-8 " | Cal. brandy | 9 | " | a. | 2.50 | 22.50 |
| ½ bbl. | 1.50 whiskey '90 | 10 | " | a. | 1.40 | 15.50 |
| 1 " | C. B. Cook " 1885 | 34.84 | " | a. | 3.25 | 113.23 |
| 1 " | Baker's rye | 14 | " | a. | 2.50 | 35 |
| 1 " | peach brandy Walters | 34.84 | " | a. | 2.50 | 87.10 |
| 3 " | Astor '86 | 107.11 | " | a. | 3.25 | 348.11 |
| 4 " | R. Monarch '89 | 155.05 | " | a. | 2.50 | 387.62 |
| 1 " | Silk Velvet wh'y | 22.44 | " | a. | 2.75 | 61.71 |
| 3 " | peach brandy | 115.28 | " | a. | 2.50 | 288.20 |
| 2 " | J. E. Pepper '87 | 69.40 | " | a. | 3.50 | 242.90 |
| 1-8 cask | Jam. rum | 28.56 | " | a. | 5.50 | 157.08 |
| 1 bbl. | C. B. Cook 1885 | 42.12 | " | a. | 3 25 | 132.89 |
| 1 " | Woodland 1886 | 40.90 | " | a. | 3.00 | 122.70 |
| 2 " | Zinfandell | 103½ | " | a. | .75 | 77.63 |
| 2-8 casks | imported sherry | 43 | " | a. | 1.50 | 64.50 |
| 4 bbls. | Cal. port | 205 | " | a. | 1.00 | 205 |
| 5 " | " sherry | 207½ | " | a. | 1.00 | 207.50 |
| 13 " | " Zinfandell | 679½ | " | a. | .75 | 509.63 |
| 5 " | " claret | 264 | " | a. | .35 | 92.40 |
| 4 " | " Cabernet | 210½ | " | a. | 1.25 | 263.12 |
| 5 " | rock-candy syrup | 232½ | " | a. | 1.00 | 232.50 |
| 3 casks | cherry juice | 495 | " | a. | 1.15 | 569.25 |
| 18 " | Moerlein beer qts. glass | | | a. | 10.00 | 180 |
| 14 " | " " jugs | | | a. | 15.00 | 210 |
| 1 " | Burke's porter 8 doz. | | | a. | 1.75 | 14 |
| 4 " | White Label ale | | | a. | 16.00 | 64 |
| | F'w'd | | | | | 32,685.85 |
| 56 | Amount f'w'd | | | | | 32,685.85 |
| 2 casks | C. & C. ginger ale 20 doz. | | | a. | 1.25 | 25 |
| 1 " | Bass ale 8 doz. | | | a. | 1.75 | 14 |
| 64 cases | Belle of Adderson qts. | | | a. | 12.00 | 768 |
| 14 " | " " pts. | | | a. | 13.00 | 182 |
| 14 " | Curacoa impt. | | | a. | 17.00 | 238 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 14 | cases | Annisette | impt. | a. | 17.00 | 238 |
| 4 | " | creme de menthe | " | a. | 18.00 | 72.00 |
| 2 | " | " de vanille | " | a. | 18.00 | 36 |
| 1 | " | kimmell | " | a. | 17.00 | 17 |
| 1 | " | kirschwasser | " | a. | 18.00 | 18 |
| 3 | " | creme de cocoa | " | a. | 18.00 | 54 |
| 3 | " | Maraschino | " | a. | 17.00 | 51 |
| 1 | " | Chat. Belair claret | | a. | 6.50 | 6.50 |
| 1 | " | Parville cognac | | a. | 15.00 | 15 |
| 4 | " | Marfelle " dom. | | a. | 12.00 | 48 |
| 21 | " | sauternes C. & F. F. qts. | | a. | 8.50 | 178.50 |
| 4 | " | Hennessy cognac dom. | | a. | 12.00 | 48 |
| 5 | " | Chat. Belair claret pts. | | a. | 6.50 | 32.50 |
| 2 | " | sauterne pts. C. & F. F. | | a. | 9.50 | 19.00 |
| 1 | " | Bouliac " | | a. | 6.00 | 6 |
| 2 | " | haute sauternes pts. C. & F. F. | | a. | 13.00 | 26 |
| 4 | " | creme de menthe imp. | | a. | 18.00 | 72 |
| 1 | " | " " vanilla | " | a. | 18.00 | 18 |
| 1 | " | " " cacoa | " | a. | 18.00 | 18 |
| 3 | " | kirschwasser | " | a. | 18.00 | 54 |
| 1 | " | creme de vanilla | " | a. | 18.00 | 18 |
| 1 | " | kimmell | " | a. | 17.00 | 17 |
| 8 | " | haute sauterne C. & F. F. qts. | | a. | 12.00 | 96 |
| 4 | " | Pontet Canet | " pts. | a. | 12.00 | 48 |
| 20 | " | Chat. Bouliac | " " | a. | 8.50 | 170 |
| 3 | " | Martelle cognac imp. | | a. | 21.00 | 63 |
| 51 | " | Chat. Boulliac | C. & F. F. qts. | a. | 7.50 | 382.50 |
| 2 | " | " Lotour Blanche | " " | a. | 18.00 | 36 |
| 2 | " | " Chat. Ygnem | " " | a. | 24.00 | 48 |
| 8 | " | Pontet Canet | " " | a. | 11.00 | 88 |
| | | | | | | 35,906.95 |
| 57 | | Amount f'w'd | | | | 35,906.85 |
| 4 | cases | haute sauternes C. & F. F. pts. | | a. | 8.50 | 34 |
| 2 | " | Chat. Ygnem | " " | a. | 25.00 | 50 |
| 1 | " | Medoc | " " | a. | 7.50 | 7.50 |
| 1 | " | Maraschino imp. | | a. | 17.00 | 17 |
| 1 | " | absynthe " | | a. | 19.00 | 19 |
| 7 | " | Guckenheimer rye qts. | | a. | 8.50 | 59.50 |
| 8 | " | Hermitage " | | a. | 8.50 | 68 |
| 22 | " | Laubenheimer imp. " | | a. | 8.00 | 176 |
| 3 | " | Niersteiner " " | | a. | 10.00 | 30 |
| 2 | " | Rudesheimer " " | | a. | 14.00 | 28 |
| 20 | " | Deisesheimer dom. | | a. | 4.50 | 90 |
| 14 | " | Rudesheimer " | | a. | 4.50 | 63 |
| 12 | " | White Seal champ. pts. | | a. | 33.00 | 396 |
| 3 | " | " " " | qts. | a. | 31.00 | 93 |
| 6 | " | old Catawba | " | a. | 3.50 | 21 |
| 1 | " | stomach bitters | | a. | 6.00 | 6 |
| 2 | " | sweet Catawba | | a. | 4.50 | 9 |
| 4 | " | Angelica | | a. | 4.50 | 18 |
| 2 | " | Lohengrin bitters | | a. | 5.00 | 10 |
| 8 | " | Cliquot champ. pts. | | a. | 33.00 | 264 |
| 20 | " | Roederer " " | | a. | 33.00 | 660 |
| 6 | " | " " " | qts. | a. | 31.00 | 186 |
| 18 | " | Mumm E. D. champ. pts. | | a. | 33.00 | 594 |
| 4 | " | " " " | qts. | a. | 31.00 | 124 |
| 31 | " | aromatique bitters. | | a. | 12.00 | 372 |
| 1 | " | St. Julien dom. qts. | | a. | 3.50 | 3.50 |
| 5 | " | haute sauterne dom. qts. | | a. | 4.50 | 22.50 |
| 13 | " | St. Estephe " " | | a. | 3.50 | 45.50 |
| 8 | " | vermouth | | a. | 6.00 | 48 |
| 5 | " | creme de menthe dom. | | a. | 12.00 | 60 |
| 4 | " | Chat. Larose claret dom. | | a. | 3.50 | 14 |
| 2 | " | Benedictine | | a. | 18.00 | 36 |

| | | | | | |
|---|---|---|---|---|---|
| 2 | cases St. Emillien claret B. P. qts | a. | 5.00 | | 10 |
| 5 | " Gran. Crn. Bouilliac imp. pts | a. | 7.50 | | 37.50 |
| 20 | " " " " " qts | a. | 6.50 | | 130 |
| | F'w'd | | | | 39,708.85 |
| 58 | Amount f'w'd | | | | 39,708.85 |
| 106 | cases Hostetter's bitters | a. | 8.00 | | 848 |
| 17 | " Boker's " | a. | 17.50 | | 212.50 |
| 35 | " Angostura " | a. | 17.50 | | 560 |
| 8 | " Mahoo " | a. | 3.50 | | 28 |
| 9 | " abricotine imp. | a. | 18.00 | | 162 |
| 5 | " ext. ginger qts | a. | 10.00 | | 50 |
| 7 | " " peppermint qts | a. | 10.00 | | 70 |
| 3 | " Angustora aromatique | a. | 12.00 | | 36 |
| 8 | " " " ½ | a. | 6.00 | | 48 |
| 2 | " Caracas bitters | a. | 12.00 | | 24 |
| 3 | " Bornekamp bitters | a | 9.00 | | 27 |
| 10 | " ext. ginger pts | a. | 6.00 | | 60 |
| 3 | " " peppermint pts | a. | 6.00 | | 18 |
| 4 | " rum punch | a. | 5.00 | | 20 |
| 2 | " cocktail qts | a. | 5.00 | | 10 |
| 63 | " St. Jacob's malt wh'y | a. | 8.00 | | 504 |
| 30 | " Caste de Or champs | a. | 10.00 | | 300 |
| 33 | " Sunnybrook wh'y | a. | 10.00 | | 330 |
| 25 | " Rood & Son gin imp | a. | 11.00 | | 275 |
| 20 | " Maraschino cherries | a. | 10.00 | | 200 |
| 25 | " Lithaner bitters | a. | 10.00 | | 250 |
| 4 | " Lenoir cognac | a. | 9.00 | | 36 |
| 2 | " Ashwood whiskey | a. | 8.00 | | 16 |
| 4 | " Fly's blackberry cordial | a. | 6.00 | | 24 |
| 3 | " strawberry syrup | a. | 4.50 | | 13.50 |
| 5 | " Schiedam & Tom gin | a. | 7.00 | | 35 |
| 10 | " White Seal champ. pts | a. | 33.00 | | 330 |
| 9 | " Ashwood whiskey | a. | 8.00 | | 72 |
| 1 | " vermouth dom. | a. | 5.00 | | 5 |
| 5 | " Lexington Club wh'y | a. | 7.50 | | 27.50 |
| 1 | " Magales Monarch | a. | 10.00 | | 10 |
| 8 | " —— kimmell, dom | a. | 4.00 | | 32.00 |
| 6 | " silver punch bowls | a. | 9.00 | | 54 |
| 8 | " Maraschino, dom | a. | 10.00 | | 80 |
| 5 | " ext. celery | a. | 9.00 | | 45 |
| | F'w'd | | | | 44,531.35 |
| 59 | Amount f'w'd | | | | 44,531.35 |
| 11 | cases wild cherry bitters, small | a. | 2.00 | | 22.00 |
| 2 | " " " " " | a. | 1.00 | | 2.00 |
| 1 | " crys. rock & rye dom | a. | 7.50 | | 7.50 |
| 4 | " " peach & H. " | a. | 7.50 | | 30.00 |
| 3 | " kimmell dom | a. | 7.50 | | 22.50 |
| 4 | " Curacoa " | a. | 10.00 | | 40.00 |
| 1 | " Maraschino cherries | a. | 10.00 | | 10.00 |
| 2 | " Hermitage wh'y | a. | 8.50 | | 17.00 |
| 1 | " abricotine dom | a. | 12.00 | | 12.00 |
| 1 | " Annisette " | a. | 10.00 | | 10.00 |
| 14,200 | Henry Lee cigars | a. | 25.00 | | 355.00 |
| 2,475 | Lola cigars | a. | 55.00 | | 1,786.12 |
| 10,400 | La Perlad Tampa Conchitas | a. | 60.00 | | 624.00 |
| 6,000 | " " Londres Chico | a. | 65.00 | | 390.00 |
| 5,000 | " " " " | a. | 65.00 | | 330.00 |
| 8,400 | " " Imperials | a. | 80.00 | | 672.00 |
| 5,300 | " " Opera | a. | 57.00 | | 302.10 |
| 2,500 | " " Reina Vic | a. | 75.00 | | 187.50 |
| 2,600 | " " " " | a. | 75.00 | | 195.00 |
| 600 | " " Londres Grands | a. | 80.00 | | 48.00 |

| | | | | |
|---|---|---|---|---|
| 13,200 | Victor cig | a. | 24.00 | 316.80 |
| 13,750 | Choice Puff cigar | a. | 27.00 | 371.25 |
| 31,650 | Grand Bretam " | a. | 65.00 | 2,057.25 |
| 17,450 | Uno cigar | a. | 22.50 | 392.63 |
| 15,650 | Vanity Fair cigar | a. | 31.00 | 485.15 |
| 10,000 | High Flyer " | a. | 25.00 | 250.00 |
| 18,950 | 50 cent brand " | a. | 30.00 | 568.50 |
| 10,100 | Red Snapper " | a. | 30.00 | 303.00 |
| 31,475 | Spaniola cigars | a. | 33.00 | 1,038.67 |
| 25,600 | Hobby " | a. | 22.50 | 576.00 |
| 18,775 | Flor de Columbia cigar | a. | 42.00 | 788.55 |
| 7,025 | Monopole Rothchild " | a. | 73.00 | 512.83 |
| 27,300 | Mirabilie cigar | a. | 35.00 | 955.50 |
| 7,450 | Monopole Lond. Grands cigar | a. | 72.00 | 536.40 |
| 3,250 | " " " Chico " | a. | 62.00 | 201.50 |
| | F'w'd | | | 58,948.10 |
| 60 | Amount f'w'd | | | 58,948.10 |
| 12,025 | Furiosa cigars | a. | 20.00 | 240.50 |
| 14,300 | Texas Belle cigars | a. | 28.00 | 400.40 |
| 10,200 | Martha " | a. | 28.00 | 285.60 |
| 5,600 | Principe de Gales Lond. Chico | a. | 70.00 | 392.00 |
| 2,400 | " " " Conchitas | a. | 62.00 | 148.80 |
| 850 | " " " Conchas | a. | 74.00 | 62.90 |
| 400 | " " " Londres Grande | a. | 82.00 | 32.80 |
| 6,400 | Almota cigars | a. | 22.50 | 144.00 |
| 2,300 | Havana Belle cigars | a. | 22.50 | 51.75 |
| 650 | La Juniata " | a. | 22.50 | 14.63 |
| 10,175 | Masher " | a. | 25.00 | 254.37 |
| 4,100 | Heart's Ease " | a. | 15.00 | 61.50 |
| 2,300 | Arabian Nights " | a. | 25.00 | 57.50 |
| 7,450 | Crown Middy " | a. | 35.00 | 260.75 |
| 7,575 | Delicosas " | a. | 65.00 | 492.37 |
| 2,200 | Garcia Reg. Fina cigars | a. | 95.00 | 209.00 |
| 1,250 | " Panettetas " | a. | 90.00 | 112.50 |
| 125 | " Petit Invincible | a. | 150.00 | 18.75 |
| 500 | " Cognetta | a. | 75.00 | 37.50 |
| 5,250 | La Resa Comme Il Faut cigars | a. | 72.00 | 378.00 |
| 5,100 | " Preciosa " | a. | 81.00 | 413.10 |
| 800 | " Petit Duc " | a. | 81.00 | 64.80 |
| 100 | " Conchita " | a. | 62.00 | 6.20 |
| 500 | " Reg. Chica " | a. | 120.00 | 60.00 |
| 2,300 | " Londres Chica " | a. | 70.00 | 161.00 |
| 100 | Brown Beauty cigars | a. | 20.00 | 2.00 |
| 5,000 | Tom Moore " | a. | 65.00 | 325.00 |
| 2,500 | Premier " | a. | 33.00 | 82.50 |
| 11,800 | Dear and Sweet " | a. | 29.00 | 342.20 |
| 2,125 | Livadia " | a. | 75.00 | 159.37 |
| 7,050 | Key West Extra " | a. | 75.00 | 528.75 |
| 7,700 | F. K. & Co. Seal " | a. | 24.00 | 184.80 |
| 7,000 | Fortuna " | a. | 31.00 | 217.00 |
| 3,050 | Cuban " | a. | 35.00 | 106.75 |
| 2,450 | Kicker " | a. | 32.50 | 79.62 |
| | F'w'd | | | 65,336.81 |
| 61 | Amount f'w'd | | | 65,336.81 |
| 5,400 | Lillian Russell Saratoga cig | a. | 63.00 | 340.20 |
| 7,650 | " " " Perfecto " | a. | 70.00 | 535.50 |
| 2,800 | " " " " " | a. | 70.00 | 196.00 |
| 5,850 | " " Bouquet Flor cig | a. | 66.00 | 386.10 |
| 5,700 | " " Petit Bouquet | a. | 45.00 | 256.50 |
| 1,300 | Palmetto " | a. | 25.00 | 32.50 |
| 300 | Mexicano " | a. | 45.00 | 13.50 |
| 7,300 | Royal Smoke " | a. | 25.00 | 182.50 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 150 Palmetto | Petit Bouquet | | | a. | 25.00 | 3.75 |
| 3,475 Plymouth | " | | | a. | 33.00 | 114.67 |
| 5,600 Volunteer | " | | | a. | 30.00 | 168 |
| 7-2 bbls. Kelly Island Cat. A. A | | 185½ | gal. | a. | 1.00 | 185.50 |
| 2 bbls. Cal. Reisling | | 101½ | " | a. | .75 | 76.12 |
| 3 " " hock | | 153½ | " | a. | .60 | 92.10 |
| 3 " " Angelica | | 152½ | " | a. | 1.00 | 152.50 |
| 5 " " Angelica | | 253 | " | a. | 1.00 | 253 |
| 3 " sweet Catawba | | 143½ | " | a. | .75 | 107.67 |
| 13-2 bbls. sweet Catawba | | 342 | " | a. | .75 | 256.50 |
| 4 " Cal. claret | | 209 | " | a. | .35 | 73.15 |
| 1 " " " | | 51½ | " | a. | .35 | 18.03 |
| 5-2 " imp. prune juice | | 140 | " | a. | 1.35 | 189 |
| 21-8 casks " port wine | | 358 | " | a. | 1.50 | 537 |
| 15-8 " " sherry wine | | 326 | " | a. | 1.50 | 489 |
| 5-8 " " " " | | 97½ | " | a. | 1.50 | 146.25 |
| 9-8 " " port " | | 159 | " | a. | 1.50 | 238 50 |
| 12-2 bbls. Cal. Angelica | | 323 | " | a. | 1.00 | 323 |
| 10 " " claret | | 508 | " | a. | .35 | 177.80 |
| 5 " " Reisling | | 257½ | " | a. | .75 | 193.18 |
| 4 " " hock | | 205½ | " | a. | .60 | 123.30 |
| 1 " " sauternes | | 51½ | " | a. | .75 | 38.62 |
| 1-8 cask imp. vinegar | | 26½ | " | a. | .75 | 19.87 |
| 1 bbl. Cal. port wine | | 52½ | " | a. | 1.00 | 52.50 |
| 1 " " claret | | 51½ | " | a. | .35 | 18.03 |
| 9-8 casks imported sherry | | 133½ | " | a. | 1.50 | 200.25 |
| 17 cash registers | | | | a. | 60.00 | 1,020.00 |
| F'w'd | | | | | | 72,546.90 |
| 62 Amount f'w'd | | | | | | 72,546.90 |
| 9 casks Moerlein beer glass qts | | | | a. | 10.00 | 90 |
| 4 " " " jugs pts | | | | a. | 16.00 | 64 |
| 3 cases O. F. C. Taylor whiskey | | | | a. | 8.50 | 25.50 |
| 5 " Old Crowe " | | | | a. | 8.50 | 42.50 |
| 8 " McBrayer " | | | | a. | 8.50 | 68 |
| 13 " claret, dom | | | | a. | 3.50 | 45.50 |
| 10 gross imp. claret bottles | | | | a. | 8.00 | 80.00 |
| 3 " " Boker " | | | | a. | 8.00 | 24 |
| 2 " " sauterne bottles | | | | a. | 8.50 | 17 |
| 2 " " hock " | | | | a. | 8.50 | 17 |
| 1 " " kimmell " | | | | a. | 8.00 | 8 |
| 2 casks revolver flasks, 26 doz | | | | a. | 1.00 | 26 |
| ½ bbl. Angelica wine, 27½ | | | | a. | 1.00 | 26.50 |
| ½ " imp. port " 14 | | | | a. | 1.50 | 21 |
| 2 " Cal. " " 100 | | | | a. | 1.00 | 100 |
| 1 " " claret, 51 | | | | a. | .35 | 17.85 |
| 187 5 gall. demijohns | | | | a. | .60 | 112.20 |
| 103 3 " " | | | | a. | .45 | 46.35 |
| 64 2 " " | | | | a. | .35 | 22.40 |
| 1 2 " " | | | | a. | .35 | .35 |
| 121 1 " " | | | | a. | .25 | 30.25 |
| 90 ½ " " | | | | a. | .20 | 18 |
| 23 5 " " old | | | | a. | .50 | 11.50 |
| 2 2 " " " | | | | a. | .30 | .60 |
| 2 3 " " " | | | | a. | .40 | 1.20 |
| 6 jugs | | | | a. | .10 | .60 |
| 2 M. T. 3 M. cigar cases | | | | a. | .60 | 1.20 |
| 2 " 2½ " " | | | | a. | .55 | 1.10 |
| 4 " 2 " " | | | | a. | .45 | 1.80 |
| 5 " 1½ " " | | | | a. | .40 | 2.00 |
| 15 " 1 " " | | | | a. | .30 | 4.50 |
| 5 " ½ " " | | | | a. | .25 | 1.25 |
| 18 " liquor | | | | a. | .25 | 4.50 |
| 10 5-gall. M. T. liquor kegs | | | | a. | .80 | 8.00 |
| 2 10 " " " " | | | | a. | .60 | 1.20 |
| F'w'd | | | | | | 73,488 75 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 63 | Amount f'w'd | | | | | | | | | 73,488.75 |
| 4 | bundles straw covers pts. | 2,000 | | | | | a. | 5.00 | | 10 |
| 28 | " " " qts. | 17,250 | | | | | a. | 6.00 | | 103.50 |
| 1 | 5-gal. boxed dem. old | | | | | | a. | 1.15 | | 1.15 |
| 1 | cash register | | | | | | a. | 60.00 | | 60.00 |
| 1 | trunk | | | | | | a. | 17.00 | | 17 |
| 1 | sample case | | | | | | a. | 12.00 | | 12 |
| 8 | bags 500 each | 7 x corks | | 4,000 | | | a. | .22½ | | 9 |
| 18 | " 500 " | 6 to 10 com. | " | 9,000 | | | a. | .19 | | 17.10 |
| 1 | " 500 " | 4 x corks | | 500 | | | a. | 8½ | | .42 |
| 1 | " 500 " | 10 x " | | 500 | | | a. | .42½ | | 2.12 |
| 3 | " 500 " | 6 x " | | 1,500 | | | a. | .14½ | | 2.17 |
| 6 | " 500 " | 8 com. " | | 3,000 | | | a. | .15½ | | 4.65 |
| 12 | " 5 gross " | asst. x " | | 60 | gross | | a. | .82 | | 49.20 |
| 1 | " 5 " " | 6 to 10 x " | | 5 | " | | a. | .82 | | 4.10 |
| 23 | " 5 " " | 4 x " | | 115 | " | | a. | .12½ | | 14.37 |
| 23 | " 1 " " | 12 x " | | 23 | " | | a. | .78 | | 17.94 |
| 1 | " 1 " " | 12 x " | | 1 | " | | a. | .78 | | .78 |
| 1 | " 1 " " | 10 com. " | | 1 | " | | a. | .23 | | .23 |
| 5 | " 1 " " | 11 " " | | 5 | " | | a. | .26½ | | 1.32 |
| 2 | " 1 " " | 17 x " | | 2 | " | | a. | 1.74 | | 3.48 |
| 22 | " 1 " " | 14 x " | | 22 | " | | a. | .96 | | 21.12 |
| 1 | " 1 " " | 14 x " | | 1 | " | | a. | 1.74 | | 1.74 |
| 17 | " 5 " | 6 to 10 x " | | 85 | " | | a. | .41 | | 34.85 |
| 3 | " 1 " " | 20 x " | | 3 | " | | a. | 2.50 | | 7.50 |
| 25 | " 5 " " | 7 x " | | 125 | " | | a. | .33 | | 41.25 |
| 79 | " 5 " " | 5 x x " | | 395 | " | | a. | .16½ | | 65.18 |
| 91 | " 5 " " | 6 x " | | 455 | " | | a. | .21 | | 95.55 |
| 79 | " 5 " " | 8 x " | | 395 | " | | a. | .40 | | 158 |
| 4 | " 5 " " | 8 com. " | | 20 | " | | a. | .22½ | | 4.50 |
| 3 | " 5 " | 8½ x 1¼ B hand cut | | 15 | " | | a. | .75 | | 11.25 |
| 4 | " 5 " | 8½ x 1½ A hand cut | | 20 | " | | a. | 1.00 | | 20 |
| 3 | " 5 " | 9 a. 1¾ A " " | | 15 | " | | a. | 1.15 | | 17.25 |
| 3 | " 5 " | 9 x 1¾ B " " | | 15 | " | | a. | .90 | | 13.50 |
| 16 | 8 casks imp. sherry | | | 146½ | gall. | | a. | 1.50 | | 219.75 |
| 1 | bbl. ginger ext. | | | 37 | " | | a. | 2.00 | | 74.00 |
| | F'w'd | | | | | | | | | 74,604.72 |
| 64 | Amount f'w'd | | | | | | | | | 74,604.72 |
| 3 | bbl. claret Cal | | | 109 | gal. | | a. | .35 | | 38.15 |
| 3 | " hock " | | | 137½ | " | | a. | .60 | | 82.50 |
| 2 | " sherry " | | | 89½ | " | | a. | 1.00 | | 89.50 |
| 2 | " port " | | | 55 | " | | a. | 1.00 | | 55 |
| 1 | " raspberry juice | | | 22 | " | | a. | 1.50 | | 33 |
| 2-2 | " rocky-candy syrup | | | 36 | " | | a. | 1.00 | | 36 |
| 3 | " " " " | | | 140 | " | | a. | 1.00 | | 140 |
| 1 | " prune juice | | | 44 | " | | a. | 1.35 | | 59.40 |
| 1 | " Cabernet claret | | | 39½ | " | | a. | 1.25 | | 49.38 |
| ½ | " sherry Cal | | | 26 | " | | a. | 1.00 | | 26 |
| 1 | " orange wine | | | 11 | " | | a. | 1.00 | | 11 |
| 1 | " imported claret | | | | | | a. | 65.00 | | 65 |
| 2 | " " " | | | | | | a. | 65.00 | | 130 |
| 5 | " demijohn 60 white wine | | | 25 | galls. | | a. | .60 | | 18 |
| ½ | " bbl. blackberry juice | | | 10 | " | | a. | 1.00 | | 10 |
| 1 | " sherry Cal | | | 25 | " | | a. | 1.00 | | 25 |
| 1 | " Catawba | | | 27½ | " | | a. | .75 | | 20.63 |
| 1 | can 1.00 4 galls. alcohol | | | 4 | " | | a. | 2.55 | | 11.20 |
| ½ | bbl. imp. vinegar | | | 8 | " | | a. | .75 | | 6.00 |
| ½ | " Catawba A A | | | 18 | " | | a. | 1.00 | | 18 |
| ½ | " Angelica | | | 21 | " | | a. | 1.00 | | 21 |
| 1 | " cherry juice | | | 35 | " | | a. | 1.15 | | 40.25 |
| 1-8 | cask imp. sherry fine | | | 31 | " | | a. | 2.75 | | 85.25 |
| 1 | bbl. Angelica | | | 39 | " | | a. | 1.00 | | 39 |
| 1 | " port | | | 23 | " | | a. | 1.00 | | 23 |

| | | | | | |
|---|---|---|---|---|---|
| 3 bbl. Malaga | 117½ galls. | a. | 1.35 | | 158.62 |
| 1 " Cabernet claret | 40 " | a. | 1.25 | | 50 |
| 68 cases Aurora water qts | | a. | 6.00 | | 408 |
| 70 hampers " " " | " | a. | 5.50 | | 385 |
| 3 casks Moerlein beer glass qts | " | a. | 10.00 | | 30 |
| 15 cases jug beer pts | " | a. | 5.10 | | 76.50 |
| 3 " " " qts | " | a. | 5.10 | | 15.30 |
| 244 gross ½ pt. flasks | " | a. | 3.25 | | 793 |
| 157½ " " " | " | a. | 4.25 | | 669.68 |
| 7½ " qt. " | a. | 7.00 | | | 52.50 |
| F'w'd | | | | | 78,375.58 |
| 65 Amount f'w'd | | | | | 78,375.58 |
| 24 gross imported claret bottles | a. | 8.00 | | | 192 |
| 1 case 12 McKenna beer faucets | a. | 12.00 | | | 144.00 |
| 99 5-gall. boxed demijohns | a. | 1.50 | | | 148.50 |
| 25 2-gall. " " | a. | .75 | | | 18.75 |
| 25 1 " " " | a. | .60 | | | 15.00 |
| ½ bbl. sugar coloring 25½ gals | a. | 1.80 | | | 45.90 |
| ½ bbl. rock-candy syrup | 25 galls. | a. | 1.00 | | 25 |
| 1 case ex. peppermint | 7 bottles dom. qts. | a. | 10.00 | | 5.83 |
| 1 " Boker bitters | 4 " " qts. | a. | 9.00 | | 3 |
| 1 " peach & honey cryst | 11 " qts. | a. | 7.50 | | 688 |
| 1 " Roeder champ | 23 " pts. | a. | 33.00 | | 31.62 |
| 1 " Boonekamp bitt | 11 " qts. | a. | 9.00 | | 8.25 |
| 1 " Boker's " | 12 " qts. | a. | 12.50 | | 12.50 |
| 1 " Irish whiskey | 4 " qts. | a. | 12.00 | | 4 |
| 1 " Benedictine | 34 " pts. | a. | 19.00 | | 19 |
| 1 " ex. ginger | 7 " qts. | a. | 10.00 | | 5.83 |
| 1 " Old Crow whiskey | 11 " qts. | a. | 8.50 | | 7.79 |
| 1 " Chat. Bouliac | 13 " pts. | a. | 8.50 | | 4.60 |
| 1 " Pontet Canet | 10 " qts. | a. | 11.00 | | 10.08 |
| 1 " Ashwood wh'y | 9 " qts | a. | 8.00 | | 6 |
| 1 " It. vermouth | 6 " qts. | a. | 6.00 | | 3 |
| 1 " sauternes imp | 12 " qts. | a. | 8.50 | | 8.50 |
| 1 " rock & rye cryst | 6 " qts. | a. | 7.50 | | 3.75 |
| 1 " kummell | 8 " qts. | a. | 4.00 | | 2.66 |
| 1 " Old Tom gin | 11 " qts. | a. | 7.00 | | 6.42 |
| 1 " Moet & Chandon chm | 15 " pts. | a. | 33.00 | | 20.62 |
| 1 " Boker's imp | 6 " qts. | a. | 12.50 | | 6.25 |
| 1 " creme de menthe imp | 12 " qts. | a. | 18.00 | | 18 |
| 1 " haute sant | 11 " qts. | a. | 12.00 | | 11 |
| 1 " Belle of Anderson | 21 " pts. | a. | 13.00 | | 11.38 |
| 1 " Curacoa imp | 10 " qts. | a. | 18.00 | | 15 |
| 1 " cryst. kummell imp | 4 " qts. | a. | 18.00 | | 6 |
| 1 " Mumm E. D. champ | 11 " qts. | a. | 31.00 | | 28.42 |
| 1 " Clicquot champ | 11 " pts. | a. | 33.00 | | 15.12 |
| 1 " Mumm E. D. champ | 3 " pts. | a. | 33.00 | | 11.00 |
| F'w'd | | | | | 79,257.23 |
| 66 Amount f'w'd | | | | | 79,257.23 |
| 1 case abricotine dom | 10 bottles qts. | a. | 12.00 | | 10 |
| 1 " haute sant | 11 " " | a. | 12.00 | | 11 |
| 1 " vanilla syrup | 10 " " | a. | 4.00 | | 3.33 |
| 1 " Scotch wh'y dom | 12 " " | a. | 6.00 | | 6 |
| 1 " creme de menthe imp | 9 bottles qts. | a. | 18.00 | | 13.50 |
| 1 " kirschwasser | 11 " " | a. | 18.00 | | 16.50 |
| 1 " Maraschino | 10 " " | a. | 17.00 | | 14.17 |
| 8 bundles wrapping paper | | | | | 40 |
| 1 case Belle of Anderson | a. | 12.00 | | | 12 |
| 14 " Magales Monarch | a. | 10.00 | | | 140 |
| 4 bbls. 18 doz. Moerlein jugs qts | a. | 1.00 | | | 18 |
| 8 " 64½ " " pts | a. | .80 | | | 51.60 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | case | Fly's blackberry cordial | 4 | bottles | a. | 6.00 | 2 |
| 1 | " | De Kuper's gin | 6 | " | a. | 6.00 | 3 |
| 1 | " | Lenoir cognac | 11 | " | a. | 9.00 | 8.25 |
| 1 | " | Ashwood whiskey | 5 | " | a. | 8.00 | 3.33 |
| 1 | " | Angostura bitters | 10 | " | a. | 17.00 | 7.00 |
| 1 | " | Anisette imp. | 4 | " | a. | 17.00 | 5.60 |
| 1 | " | French vermouth | 9 | " | a. | 6.00 | 4.50 |
| 1 | " | creme de menthe dom | 7 | " | a. | 12.00 | 7 |
| 1 | " | " " " imp | 9 | " | a. | 18.00 | 13.50 |
| 1 | " | Angostura | 12 | " | a. | 17.00 | 8.50 |
| 1 | " | Boker's dom | 10 | " | a. | 9.00 | 7.50 |
| 1 | " | Chat. Boulliac | 7 | " | a. | 7.50 | 4.37 |
| 1 | " | creme de menthe, imp | 12 | " | a. | 18.00 | 18 |
| 1 | " | Hostetter bitters | 7 | " | a. | 8.00 | 4.67 |
| 1 | " | Magales Monarch | 9 | " | a. | 10.00 | 7.50 |
| 2 | " | Chateau Larose pts | | | a. | 5.50 | 11 |
| 3 | " | " " " | | | a. | 5.50 | 16.50 |
| 1 | " | Benedictine imp | 6 | bottles qts | a. | 18.00 | 9 |
| 1 | " | creme de menthe imp | 4 | bottles qts. | a. | 18.00 | 6 |
| 1 | " | cryst. R. & rye | 10 | " " | a. | 7.50 | 6.25 |
| 1 | " | Old Tom gin | 10 | " " | a. | 6.00 | 5 |
| 261 | " | quarter kegs beer | | | a. | 2.50 | 652.50 |
| 88 | " | half bbls | | | a. | 5.00 | 440 |
| | | F'w'd | | | | | 80,844.30 |
| 67 | | Amount forward | | | | | $80,844.30 |
| 1 | case | cryst. kimmell imp., 1 bottle | | | a. | 18.00 | 1.50 |
| 1 | " | Maraschino " 9 " | | | a. | 17.00 | 12.75 |
| 1 | " | cryst. kimmell " 10 " | | | a. | 18.00 | 15 |
| 1 | " | kirschwasser " 8 " | | | a. | 18.00 | 12 |
| 1 | " | Belle of Anderson wh'y qts. 10 bottles | | | a. | 12.00 | 10 |
| 1 | " | Chartreuse " | | | a. | 21.00 | 21 |
| 3 | " | Aurora water glass qts | | | a. | 6.00 | 18 |
| 2 | " | " " jugs " | | | a. | 5.50 | 11 |
| 1 | " | Regent " " | | | a. | 6.00 | 6 |
| 13 | " | Cruse & F. F. wines | | | | | 146.50 |
| 2 | gray | horses, Prince & Homer | | | | | 400 |
| 1 | " | " Joe | | | | | 150 |
| 1 | bay | mare Nellie | | | | | 75 |
| 2 | large | mules Cambeihl | | | | | 500 |
| 2 | large | Black & Alphonse | | | | | 400 |
| 2 | small | gray mules | | | | | 150 |
| 1 | | " Ginger | | | | | 125 |
| 1 | | " Kate | | | | | 175 |
| 2 | | " Lula & Jack | | | | | 500 |
| 1 | large | float | | | | | 200 |
| 1 | double | wagon spring | | | | | 100 |
| 2 | | buggies | | | | | 125 |
| 1 | | cart | | | | | 75 |
| 7 | sets | double harness | | | | | 140 |
| 2 | " | single " | | | | | 30 |
| 2 | " | buggy " | | | | | 30 |
| | | | | | | | $4,273.05 |

Indorsements: "No. 1702. Jacob Sonnentheil *vs.* J. J. Dickerson *et al.* In the U. S. circuit court for the eastern district of Texas sitting at Galveston. Plaintiff's amended original petition. Filed Feb'y 26, 1895. C. Dart, clerk. Scott, Levi & Smith, Willie, Campbell & Ballinger, for plaintiff."

68 *Plaintiff's First Supplemental Petition.*

Filed Feb'y 26th, 1895.

In the United States Circuit Court for the Eastern District of Texas, Sitting at Galveston.

JACOB SONNENTHEIL *vs.* J. J. DICKERSON *et al.* } No. 1702.

Now comes the plaintiff Jacob Sonnentheil, and files this his first supplemental petition in answer to the first amended original answers of the defendants filed October 18th, 1893, and says:

That the same are insufficient in law for this that none of the twelve special grounds named in said answers as therein alleged as avoiding the deed of trust mentioned in said answers, affords any sufficient basis or reason in law for holding said deed of trust fraudulent and void.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Attorneys for Plaintiff.*

Indorsements: "No. 1702. Jacob Sonnentheil *vs.* J. J. Dickerson *et al.* In the circuit court of the United States for the eastern district of Texas, sitting at Galveston. Plaintiff's first supplemental petition. Filed Feb'y 26, 1895. C. Dart, clerk. Scott, Levi & Smith, Willie, Campbell & Ballinger, for plaintiff."

*Order Granting Leave to Plaintiff to File a 1st Amended Supplemental Petition.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, February term, March 9th, 1895.

69 J. SONNENTHEIL *vs.* THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.* } C. L., No. 1702.

Upon application, leave is granted the plaintiff to file a first amended supplemental petition.

*Plaintiff's First Amended Supplemental Petition.*

Filed March 9th, 1895.

In the United States Circuit Court, Eastern District of Texas, at Galveston.

J. SONNENTHEIL
*vs.*
CHRISTIAN MOERLEIN BREWING CO. *et al.*

Now comes the plaintiff, Jacob Sonnentheil, and by leave of the court files this his amended first supplemental petition, in lieu of the first supplemental petition filed herein February 26th, 1895, in answer to the first amended original answers of the defendants filed October 18th, 1893, and plaintiff says that the said answers are insufficient in law for this that neither of the twelve special grounds alleged in said answer as avoiding the deed of trust mentioned therein, affords any sufficient basis or reason in law for holding said deed of trust fraudulent and void.

And further, plaintiff denies all and every allegation of said amended answer with the exception of so much thereof as alleges that the said deed of trust was executed by Freiberg, Klein & Co. and delivered to plaintiff as the trustee named therein, and for the purposes and consideration set forth in the instrument itself.

And plaintiff avers that said deed of trust was duly accepted by plaintiff as trustee, and by the beneficiaries of the same, long prior to the alleged levy of the writ of attachment sued out by the Moerlein Brewing Company, or any other writ of attachment, upon the property described in plaintiff's amended original petition filed in this cause.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Pl'ff.*

70 Indorsements: "No. 1702. J. Sonnentheil, plaintiff, *vs.* Christian Moerlein Brew. Co., defendant. Plaintiff's first amended supplemental petition. Filed March 9, 1895. C. Dart, clerk. Willie, Campbell & Ballinger, for plaintiff."

*Order Granting Leave to Def'ts to File 2nd Amended Original Answers.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 26th, 1895.

JACOB SONNENTHEIL
*vs.*
CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

Leave is granted d'f'ts to file 2nd amended original answers in lieu of 1st amended original answers filed by them Oct. 18, 1893.

*Second Amended Original Answer of Def't The Christian Moerlein Brewing Company.*

Filed Oct. 26, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said defendant, The Christian Moerlein Brewing Company, and, with leave of court, files this its second amended original answer, in lieu of its first amended original answer filed herein October 18, 1893, and says that the said petition is insufficient in law; and of this it prays judgment of the court.

2. And specially demurring thereto, defendant says that said petition is not sufficient in law, in this:

1. It does not appear therefrom that this court has jurisdiction of said suit and of the parties thereto.

2. It appears therefrom that this court has no jurisdiction
71 of said suit and of the parties thereto—in that in said suit there is not a controversy between citizens of different States; but that the controversy in said suit is between plaintiff, a citizen of the State of Texas, on the one part, and defendant Dickerson, a citizen of the same State, and defendant The Christian Moerlein Brewing Company, a citizen of the State of Ohio, on the other part.

3. It appears therefrom that this court has no jurisdiction of said suit and of the parties thereto—in that said suit is to recover damages of defendants for a trespass upon and conversion of plaintiff's property, and it appears therefrom that as between the party plaintiff and the parties defendant there is not diverse citizenship, nor other warrant of jurisdiction.

4. It does not particularly describe, nor in any manner sufficiently indicate, identify, or inform defendant of, the kind, quality, quantity or value of the goods, wares and merchandise and other property charged to have been wrongfully seized and taken by said defendant Dickerson; and of this it prays judgment of the court.

3. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained and says that it is not guilty of the said supposed wrongs, injuries and trespasses, or any of them, in and by said petition charged against it; and of this it puts itself upon the country.

4. And for further plea in this behalf the said defendant says:

That if it ever directed or induced its said codefendant, J. J. Dickerson, marshal of said court, to seize and take said property named in said petition, or any part thereof, from the possession of said plaintiff—which is not admitted but denied—it did so lawfully with the sole intent and purpose of procuring its said codefendant to rightfully execute said writ of attachment named in said petition, as it was his duty as such marshal to do, and not otherwise.

That such seizure and possession, if any, were made and taken by said marshal by virtue and in pursuance of a lawful and valid writ of attachment issued out of said court at the suit therein theretofore filed, No. 1693 on the docket of said court, of this defend-
72 ant against said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co., to recover a large sum of money, to wit: $28,386.21, and legal interest, for which said Freiberg, Klein & Co. were, before and at the time of the filing of said suit, indebted to this defendant.

That after the accrual of said indebtedness, and while this defendant was a creditor in and to the full amount thereof of said Freiberg, Klein & Co., the said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid comprising said firm, on December 16, 1892, having been for a long time theretofore, and being then insolvent, with intent to delay, hinder and defraud their creditors, and especially this defendant, made and gave to said plaintiff an instrument in writing, purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition, except as hereinafter shown, for the purposes and trusts, among others, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including said debts of this defendant, and of paying over and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain.

That said instrument in writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof, to delay, hinder and defraud their creditors, of whom this defendant was one, and was accepted by said plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and especially this defendant, and the said intent of said makers of said instrument was then and there well known to those named therein as preferred creditors, none of whom accepted it at any time, and the said instrument was and is as to this defendant, a creditor as aforesaid, and as to all persons and for any purpose, void, and interposed no lawful obstructions to levy of said writ of attachment and the proceedings thereunder had or complained of.

That the particulars of said instrument are shown substantially by Exhibit I. hereto attached and made part hereof for cer-
73 tainty, and it is by virtue thereof, and not otherwise, that plaintiff claims to have entered into possession of and first acquired title to said property in said petition named.

That as originally drafted said instrument invested plaintiff with power to compound, adjust, compromise and settle, or sell, and transfer and assign such of the debts, claims and demands of said grantors, Freiberg, Klein & Co., as might be disputed, or in doubt, or of doubtful nature, upon such terms as in the exercise of a sound discretion might seem to him most advantageous for the parties interested in the trust; but the provision vesting said power was af-

terwards erased and canceled by plaintiff and his said grantors, and the instrument thus altered was promptly filed by plaintiff as a chattel mortgage in the office of the county clerk of said Galveston county, at 8 o'clock p. m. of the day of its date, and recorded by said clerk as such, and no other instrument purporting to convey said property to plaintiff, was ever filed, recorded, or otherwise published.

That after the making, alteration and filing of said instrument, another instrument of like general purport, bearing date December 17, 1892, but executed and delivered by said grantors to plaintiff and by him accepted of them on the Sunday following, was secretly and fraudulently contrived by and between plaintiff and said grantors, and by them fraudulently withheld from filing, recording, or other publication, and kept secret from all persons not connected with or advised of the fraud and conspiracy hereinafter averred.

That said instrument contained and restored the said provision, canceled and erased in the instrument of December 16, and, purporting to confirm the latter, enacted a provision not embraced therein, and substantially, as follows:

And we do hereby authorize and empower each and every one of said partners in the said copartnership of Freiberg, Klein & Co., in the name of said copartnership, and in the name, place and stead of each of said partners therein, to make, execute and deliver any and all such further transfers, assignments and assurances of title in particular, with like effect as though the same were made, executed and delivered by each of us in person.

74 That said power so erased from the first instrument and restored by the second, and said power conferred for the first time by the second instrument, are of such character as to constitute badges of fraud when incorporated in a conveyance to a trustee for the benefit of preferred creditors; and for that reason, said first-named power, after being erased from the first, was restored by the second instrument, and said last-named power was created by the second instrument, and the first instrument was filed for record and recorded and the second instrument was withheld from record and the fact of its existence and contents concealed, as aforesaid.

That the purpose and effect of said acts of said grantors and plaintiff were to fraudulently communicate to said brewing company and others the belief that the powers of plaintiff as trustee were only such as were expressed in said first instrument; whereas, as between themselves, and to perfect the fraud and conspiracy hereinafter averred, the second instrument was made and accepted, and constituted the real, though secret, expression of the powers of plaintiff and of said grantors with respect to said property, the title thereto and disposition thereof.

That said second instrument was given, as was the first, with the purpose and intent on the part of the makers thereof to delay, hinder and defraud their creditors—of whom this defendant was one—and was accepted by plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and especially this defendant, and the said

intent of said makers of said instrument was then and there well known to those named therein as preferred creditors, none of whom ever accepted it, and the said instrument was and is as to this defendant, a creditor as aforesaid, and as to all persons and for any purpose void, and interposed no lawful obstruction to levy of said writ of attachment and the proceedings thereunder had or complained of; and plaintiff is now notified to produce the said instrument, and, also, the said first instrument, to be used in evidence on the trial of this suit.

That each of said instruments, in form and substance as signed, executed and delivered by the makers thereof as hereinbe-
75 fore averred, was and is fraudulent and void as to the creditors of the makers thereof, and especially as to this defendant, and was made with intent to delay, hinder and defraud said creditors, and especially this defendant, in that among other things, and in addition to the said authority and powers created by the second instrument, and the said fraudulent conduct of the parties thereto with respect to both instruments.

First. It vests in the said plaintiff, trustee herein names, the power and discretion to sell said property upon credit.

Second. It vests in said trustee the power and discretion to sell said property in parcels, or as an entirety, at public or private sale.

Third. It vests in said trustee the power and discretion to remove from the reach of creditors the whole of said property, by sale thereof on time for negotiable promissory notes, and the sale of such notes to good-faith purchasers for value.

Fourth. It vests in said trustee the power and discretion to compound, adjust, compromise and settle, or to sell, transfer and assign such debts, claims or demands as may be disputed, or be in doubt, or be of a doubtful nature, and to determine of and for himself what is disputed, in doubt, or doubtful.

Fifth. It vests in said trustee the power and discretion to prolong indefinitely the execution of said trust.

Sixth. It charges said property with the burden of counsel fees throughout the whole period employed by said trustee, in his discretion, in executing said trust.

Seventh. It conveys to the said trustee to secure debts, the character, terms, conditions and amounts of which are not disclosed, a large amount of property, including all debts, demands, notes or accounts due to the said makers thereof, and conceals the value of said property, and the character, terms, conditions, and amounts of said debts, demands, notes and accounts, so conveyed.

Eighth. It conveys to said trustee property already sold, shipped and delivered by the makers thereof and that may be thereafter acquired by them.

Ninth. It was never accepted by any of those named therein as preferred creditors.

Tenth. The makers of said instrument did not upon the
76 execution and delivery thereof, nor afterwards, deliver to said trustee, nor did he receive of them, the exclusive possession of said property; nor did said trustee then, or afterwards, assume

exclusive ownership, management, control or direction of said property in accordance with the terms of said instrument; nor did said makers then, or afterwards, withdraw themselves from said property and the direction, management and disposition thereof.

Eleventh. The makers of said instrument, shortly prior to, and in anticipation of the execution thereof, and with the formed intent to thereby delay, hinder and defraud their creditors, and as a part and in pursuance of the fraudulent conspiracy hereinafter averred, and long theretofore formed, being insolvent and knowing themselves to be so, and for the purpose of establishing a false credit with their creditors, and especially with this defendant, and enabling themselves thereby to make greater purchase of goods, and obtain greater credit from their said creditors, and especially from this defendant, to wit: on or about October 12, 1892, falsely and fraudulently represented to Bradstreet's and Dun's commercial agencies in said city of Galveston, and to this defendant, that they were solvent, and owned and possessed unexempt and available property of the net worth and value of $208,425, over and above all their liabilities, and thereby, with said fraudulent intent, procured themselves to be falsely rated on the lists of said agencies as owning and possessing unexempt and available property of said net value, in excess of all liabilities of $208,425.

Said commercial agencies were and are operated for the purpose of procuring and reporting to all those engaged in commercial business the true financial condition and standing of others so engaged; and *its* reports were and are received as correct and constitute the principal basis upon which credits are extended by and to those so engaged.

Misleading and deceiving this defendant by said rating so procured and coming to its knowledge in the usual course, and by said false representations made to it, and by other acts and pretences of solvency done and made in pursuance of said conspiracy hereinafter averred, the said makers of said instrument, being then largely indebted to this defendant, purchased of it and it sold and
77 delivered to them, on credit, during the months of October, November and December, 1892, a large quantity of valuable goods, greatly exceeding in quantity and value, the latter aggregating $—, former purchases so made during like periods, which it would not have sold them but for the deceit practiced on it by said rating so falsely and fraudulently procured; and by said other acts and pretences of solvency; and upon similar representations and by said other acts and pretences, other excessive purchases were made by them of other dealers and creditors not rated in said instrument.

Twelfth. The makers of said instrument, being insolvent, conveyed to said trustee property largely in excess of the amount of the debts thereby secured, with the fraudulent intent to realize said excess in money for their own account and remove it from the process available to their said creditors, and thereby to delay, hinder and defraud their creditors.

Thirteenth. The makers of said instrument, being insolvent prior

to the execution thereof, secured by other property and by the endorsements of solvent third parties, the debts of the persons named as beneficiaries therein, and by said instrument devoted said property therein named to the further security of said persons, with the fraudulent intent of covering and removing it from the reach of other said creditors and of thereby delaying, hindering and defrauding said creditors.

Fourteenth. The makers of said instrument, being insolvent, contemporaneously with or about the time of the execution thereof, conveyed by deed to L. Fellman, the father-in-law of said Seinsheimer, a large quantity of real estate in said Galveston county and elsewhere in said State, upon feigned considerations, but really in secret trust to him to hold for their account, for the purpose of removing said real estate from the process available to their said creditors and protect it from them, and with intent to delay, hinder and defraud them—said Fellman having full knowledge of said insolvency of said makers of said instrument.

Fifteenth. The makers of said instrument, being insolvent, and knowing themselves to be so, and known by said Fellman to
78 be so, contemporaneously with or about the time of the execution thereof, conveyed by deed to said Fellman a large quantity of real estate in said Galveston county and elsewhere in said State of Texas, of great value, for the purpose and with the intent on the part of all parties thereto of removing said real estate from the process available to their said creditors and protecting it from them, and to delay, hinder and defraud them.

Sixteenth. The makers of said instrument, being insolvent, and knowing themselves to be so, contemporaneously with or about the time of the execution thereof placed in the hands of others than the parties to said instrument a large amount of the assets of said firm of Freiberg, Klein & Co., without consideration and in secret trust to hold, convert or realize upon same for account of said firm, for the purpose and with the intent of removing said assets from process available to their said creditors and protecting said assets from them and to delay, hinder and defraud them; but said disposition of said assets was made secretly and defendant has not been able to ascertain, and is therefore unadvised and cannot allege what assets were so disposed of nor to whom.

Seventeenth. The makers of said instrument being insolvent and knowing themselves to be so, contemporaneously with or about the time of the execution thereof, made and delivered to H. Kempner, of the city of Galveston, a mortgage or trust deed, purporting to convey to one Eckford, of the city of Dallas, as trustee, to secure a debt by note held by said Kempner and owing by them of about $5,000, certain property in said city of Dallas, State of Texas, known as Randall's café and Glen Lea saloon, of the value of about $7,500; whereas, in fact said note was not a subsisting debt against said makers of said instrument and had been theretofore fully satisfied and paid, and nothing was due said Kempner on account thereof.

That said mortgage or trust deed was made and delivered for the

purpose and with the intent on the part of all the parties thereto of covering — concealing said property from this defendant and other creditors of said makers thereof, and removing it from process available to said creditors and protecting it from them, and to delay, hinder and defraud them.

79 Eighteenth. Long prior to the making of said trust deed to plaintiff, the said firm of Freiberg, Klein & Co. and the said members thereof were hopelessly insolvent, and said Fellman had endorsed for and become bound with them in a large amount upon debts owing by them to certain of their home creditors, being those named in said trust deed. Realizing, as the fact was, that their indebtedness and embarrassments were so great and their insolvency so hopeless that they must soon be forced to suspend payment of their matured and maturing debts and to discontinue business, an agreement and conspiracy was had and entered into by and between them and said Fellman that they should arrange to remove a then present, imminent and threatening embarrassment arising from their relations to some of their creditors, and this being effected, proceed to increase their stock by large credit purchases and thus put themselves in readiness to, and to in fact, discontinue and fail in their business at such time thereafter as they and said Fellman should consider best suited to the making of said transfer or disposition of their goods and assets whereby he and said other home creditors, to whom he and said firm were bound for large sums, could realize the full amount of their claims, to the exclusion and in fraud of all other creditors, and Freiberg, Klein & Co. could secure and realize for themselves whatever values remained of said goods and assets after satisfying said Fellman and said other home creditors. Said agreement and conspiracy were thenceforward executed on the part of said Freiberg, Klein & Co. by continuance in business upon false and fraudulent pretences of solvency and large capital and the purchase of large quantities of goods from dealers, including this defendant, upon faith of said dealers in the truth of said false and fraudulent pretences, with the said fraudulent view and purpose, knowing they could not and intending never to pay therefor; and on the part of said Fellman by arranging his affairs with reference to said contemplated discontinuance and failure in business and transfer and disposition of said goods and assets, with said fraudulent view and purpose; and said agreement and conspir-

80 acy culminated in the execution and delivery of said trust deed to plaintiff, who had been long theretofore selected by said Fellman to be named therein as trustee; and although said instrument purports to have been made to secure the debts therein named, yet in truth and in fact the same was made in furtherance and pursuance of said aforesaid fraudulent purpose and conspiracy had and entered into as aforesaid between said Freiberg, Klein & Co. and said L. Fellman, and to secure him against his liability for said debts arising from his said endorsements and guaranty thereof and with the full knowledge and active operation and assistance of him, the said Fellman, and at his urgent entreaty and request and with the fraudulent intent and purpose to hinder, delay,

and defraud the said creditors of said Freiberg, Klein & Co. not named in said instrument.

And the matters of this plea said defendant is ready to verify.

Wherefore it prays judgment, etc., etc.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
*Counsel for Defendant.*

"EXHIBIT I."

STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas we, Moses Freiburg and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein of the city of Dallas, in the county of Dallas, in said State of Texas, partners doing business under the firm name and style of Freiburg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and manner as hereinafter provided: Now therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we, the said Moses Freiburg and
81 Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened conveyed, assigned, set over and transferred, and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer unto Jacob Sonnentheil, also of the city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof, to wit: All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julien Freiberg, on the south side of Avenue B, or Strand street, in block No. 624, in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block No. 624 and fronting on Avenue C, or Mechanic street, in said city, and *and* also in the United States custom warehouse and storehouse in the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in, upon and about the premises aforesaid or any of them.

Also, all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description, belonging to us, and situated or contained in or upon the premises aforesaid and used or kept for

sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular the ice boxes and faucets and cash register, belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office and are herewith delivered to the said Jacob Sonnentheil.

Also, fourteen head, more or less, of horses and mules, being all the animals belonging to us and used in connection with and
82 in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B or Strand St.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with our said business and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A in the city and county of Galveston aforesaid, and comprising all the beer owned by us now contained in said building.

Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business, sold, shipped or delivered to our customers, or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open account, or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of account and documents of every description pertaining to or containing evidence of such debts, claims and demands, or the transaction in which the same accrued.

Also, all and singular the unexpired insurance contracts and policies heretofore effected and still of force upon the property hereby conveyed or any part thereof.

Also, all and singular *as* our unexpired license as wholesale or retail dealers in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever, but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall and he is hereby au-
83 thorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets and value and the evidences thereof hereinbefore mentioned and as

speedily as possible sell and convey the said personal property in parcels or as an entirety at public or private sale, and collect the said debts, claims and demands and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in the execution of this trust, including the rent of premises the hire pay and fee of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to be rendered in this behalf, and secondly the following debts owing by us, each in the order here set down and in full before those which come after.

| | |
|---|---|
| Amount owing to A. W. Fly, temporary administrator about | $3,913 91 |
| Amount owing to B. Kahn about | 1,598 60 |
| Amount owing to the Island City savings bank holder or holders and on account of our four (4) certain promissory notes for the sum of $5,000 each and payable to the order of said bank | 20,000 00 |
| Amount owing to the Island City savings bank or other holder and on account of our certain promissory note for the sum of $5,500, payable to the order of said bank | 5,500 00 |
| Amount owing to the Island City savings bank or other holder and on account of our certain promissory note payable to the order of said bank for | 4,000 00 |
| Amount owing to the First National Bank of Galveston or other holder, and on account of our five (5) certain promissory notes payable to the order of said bank, each for the sum of $5,000.00 | 25,000 00 |
| Amount owing to the American National Bank of Galveston, Texas, or other holder or holders and on account of our three (3) certain promissory notes, each — the sum of $5,000.00, and payable to the order of said bank | 15,000 00 |
| Amount owing to the said American National bank or other holder and on account of our certain promissory note payable to the order of said bank for the sum of | 2,500 00 |
| 84 Amount owing to Adoue & Lobit of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000 and discounted with said Adoue & Lobit | 10,000 00 |
| Amount owing to said Adoue & Lobit or other holder and on account of our two (2) certain promissory notes each for the sum of $2,500 and discounted with said Adoue & Lobit | 5,000 00 |
| Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000.00 payable to the order of the said Citizens' Loan Company | 10,000 00 |

Amount owing to G. Ketch or other holder and on account of our certain promissory note payable to the order of said G. Ketch for the sum of.... .. ..... 5,000 00

Amount owing to Mrs. A. Lowenstein or other holder and on account of our certain promissory note payable to the order of the said Mrs. A. Lowenstein for the sum of..... .... 3,000 00

Amount owing to S. A. Walker, or other holder or holders and on account of our three certain promissory notes each for the sum of $5,000.00, payable to the order of ourselves..... 15,000 00

Amount owing to the Irwing National Bank of New York or other holder or holders of and on account of our three (3) certain promissory notes each for the sum of $5,000, payable to the order of said bank..... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification, other descriptive items when given are from recollection and belief only and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debt mentioned, whether such amounts be stated exactly or not are intended to be secured hereby and are to be paid
85 by the said Jacob Sonnentheil in the order above given and stated; and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conveyed on him shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust and no purchaser of any such property nor any debt-making payments to the said Jacob Sonnentheil shall stand charged to see to the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on p. 3rd expunged before signing.)

In testimony of all of which we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this sixteenth day of December, A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before Jas. Spillane.
Filed Dec. 16, '92.

A. WAKELEE,
H. C. JOHNSON, *Deputy.*

Indorsements: "No. 1702. U. S. circuit court, Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Defendant The Christian Moerlein Brewing Company's second amended original answer. Filed Oct. 26, 1895. C. Dart, clerk. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, counsel."

86 *Defendant Dickerson's Second Amended Original Answer.*

Filed October 26th, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, etc., *et al.* } No. 1702.

1. And now comes the said J. J. Dickerson, and with leave of court files this his second amended original answer, in lieu of his first amended original answer filed herein October 18, 1893, and says that the said petition is insufficient in law; and of this he prays judgment of the court.

2. And specially demurring thereto, defendant says that said petition is not sufficient in law, in this:

1. It does not appear therefrom that this court has jurisdiction of said suit and of the parties thereto.

2. It appears therefrom that this court has no jurisdiction of said suit and of the parties thereto, in that in said suit there is not a controversy between citizens of different States; but that the controversy in said suit is between plaintiff, a citizen of the State of Texas, on the one part, and defendant Dickerson, a citizen of the same State, and defendant The Christian Moerlein Brewing Company, a citizen of the State of Ohio, on the other part.

3. It appears therefrom that this court has no jurisdiction of said suit and of the parties thereto, in that said suit is to recover damages of defendants for a trespass upon and conversion of plaintiff's property, and it appears therefrom that as between the party plaintiff and the parties defendant there is not diverse citizenship, nor other warrant of jurisdiction.

4. It does not particularly describe, nor in any manner sufficiently indicate, identify, or inform defendants of, the kind, quality, quantity or value of the goods, wares and merchandise and other property charged to have been wrongfully seized and taken by him; and of this he prays the judgment of the court.

87 3. And for plea in this behalf the said defendant denies all and singular the allegations in said petition contained; and says that he is not guilty of the supposed wrongs, injuries and trespasses, or any of them, in and by said petition charged against him; and of this he puts himself upon the country.

4. And for further plea in this behalf the said defendant says that if he ever seized the property named in said petition, or any part thereof, and took it from the possession of said plaintiff—which is not admitted but denied—he did so under and in obedience to

lawful writs of attachment issued out of said court, directed to him as marshal thereof, and in the pursuance of his official duty as such marshal.

He shows:

That on December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein filed on that day, numbered 1693, by the said The Christian Moerlein Brewing Company against Moses Freiberg, Samuel Klein and Joseph Seinsheimer as partners doing business under the firm name and style of Freiburg, Klein & Co. for $28,386.21 and legal interest, he levied on and took possession of a stock of goods in the store, and belonging to, and pointed out by the agent of said brewing company as the property of said Freiberg, Klein & Co.

That thereafter, on said December 23, 1892, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed numbered 1694, by Teuscher & Co. against said Freiberg, Klein & Co. for $7,891.25 and legal interest, and at the instance of said Teuscher & Co. he attached said stock of goods, subject to said attachment of said brewing company.

That thereafter, on January 14, 1893, in pursuance of a writ of attachment issued out of said court on January 12, 1893, and directed to him as marshal aforesaid, in a certain suit for debt therein filed on said date last named, numbered 1700 by Anderson & Nelson Distilleries Company against said Freiberg, Klein & Co. for $2,430.20 and legal interest, and at the instance of said distilleries company, he attached said stock of goods, subject to said attachment of said brewing company and said Teuscher & Co.

88 That thereafter, on February 6, 1893, in pursuance of a writ of attachment issued out of said court and directed to him as marshal aforesaid, in a certain suit for debt therein on that day filed, numbered 1705, by Freiberg & Workum against said Freiburg, Klein & Co. for $10,000.00 and legal interest, and at the instance of said Freiberg & Workum, he attached said goods, subject to said attachment of said brewing company, and said Teuscher & Co., and said Anderson & Nelson Distilleries Company.

That by inventory of said goods, made in pursuance of said writs the value thereof was fixed at the aggregate sum of $45,855.45.

That in pursuance of orders of sale of said goods they were sold for the sum of $51,229.91 and said sum paid into the registry of said court, subject to its order, and upon judgments and foreclosures of attachments in said suits 1693, 1694 and 1705, thereafter had, was paid therefrom to the respective parties plaintiff, on account of said judgments and to the extent thereof.

That at and before the filing of said suits and the making of said levies under and by virtue of said writs of attachment said Freiberg, Klein & Co. were indebted to the said plaintiffs therein, respectively, in the said respective sums in and by said suits sought to be recovered of them.

That after the accrual of said respective debts of said Freiberg,

Klein & Co. to said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum, plaintiffs, respectively, in said suits numbered 1693, 1694, 1700 and 1705 and while said last-named parties were, respectively, creditors of said Freiberg, Klein & Co., in and to the full amounts by them, respectively, sought to be recovered in and by said suits, said Moses Freiberg, Samuel Klein and Joseph Seinsheimer, partners as aforesaid, under the firm name and style of Freiberg, Klein & Co., on December 16, 1892, having been for a long time theretofore, and being then, insolvent, with intent to delay, hinder and defraud their creditors, of whom were the said plaintiffs in said numbered suits, respectively, made and gave
89 to said plaintiff herein, Jacob Sonnentheil, an instrument in writing, purporting to bargain, sell, grant, alien, convey, assign, set over and transfer to him property of great value, including the property named in said petition for the purposes and trusts, among other things, of using the same, or the proceeds thereof, in paying certain recited debts of said Freiberg, Klein & Co., not including the said several debts, or any of them, to plaintiffs, or any of them, in said numbered suits, and of paying and delivering to said Freiberg, Klein & Co., or their assignee, such balance of said property or proceeds as should then remain.

That said instrument in writing was given, as aforesaid, with the purpose and intent on the part of the said makers thereof to delay, hinder and defraud their creditors—of whom were the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum—and was accepted by said plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and especially the said plaintiff creditors named, none of whom ever accepted it, and the said intent of said makers of said instrument was then and there well known to those named therein as preferred creditors, and the said instrument was and is as to said omitted creditors, and as to each of them, and as to all persons and for any purpose, void, and interposed no lawful obstruction to levy of said writs of attachment, or any of them, and the proceedings thereunder had and complained of.

That the particulars of said instrument are shown, substantially, by Exhibit I hereto attached and made part hereof for certainty, and it is by virtue thereof, and not otherwise, that plaintiff claims to have entered into possession of the first acquired title to said property in said petition named.

That as originally drafted said instrument invested plaintiff with power to compound, adjust, compromise and settle, or sell and transfer and assign, such of the debts, claims and demands of said grantors, Freiberg, Klein & Co., as might be disputed, or in doubt, or of doubtful nature, upon such terms as in the exercise of a sound discretion might seem to him most advantageous for the
90 parties interested in the trust; but the provision vesting said power was afterwards erased and cancelled by plaintiff and his said grantors, and the instrument thus altered was promptly

filed by plaintiff as a chattel mortgage in the office of the county clerk of said Galveston county, at 8 o'clock p. m. of the day of its date, and recorded by said clerk as such, and no other instrument purporting to convey said property to plaintiff was ever filed, recorded, or otherwise published.

That after the making, alteration and filing of said instrument, another instrument of like general purport, bearing date December 17, 1892, but executed and delivered by said grantors to plaintiff and by him accepted of them on the Sunday following, was secretly and fraudulently contrived by and between plaintiff and said grantors, and by them fraudulently withheld from filing, recording, or other publication, and kept secret from all persons nor connected with or advised of the fraud and conspiracy hereinafter averred.

That said instrument contained and restored the said provision cancelled and erased in the instrument of December 16, and, purporting to confirm the latter, exacted a provision not embraced therein and substantially as follows:

And we do hereby authorize and empower each and every one of said partners in the said copartnership of Freiberg, Klein & Co., in the name of said copartnership, and in the name, place and stead of each of said partners therein, to make, execute and deliver any and all such further transfers, assignments and assurances of title in particular, with like effect as though the same were made, executed and delivered by each of us in person.

That said power so erased from the first instrument and restored by the second, and said power conferred for the first time by the second instrument are of such character as to constitute badges of fraud when incorporated in a conveyance to a trustee for the benefit of preferred creditors, and for that reason, said first-named power, after being erased from the first, was restored by the second instrument, and said last-named power was created by the second
91 instrument, and the first instrument was filed for record and recorded, and the second instrument was withheld from record and the fact of its existence and contents concealed, as aforesaid.

That the purpose and effect of said acts of said grantors and plaintiff was to fraudulently communicate to others the belief that the powers of plaintiff as trustee were only such as were expressed in said first instrument, whereas, as between themselves, and to perfect the fraud and conspiracy hereinafter averred, the second instrument was made and accepted, and constituted, the real, though secret expression of the powers of plaintiff and of said grantors with respect to said property, the title thereto and disposition thereof.

The said second instrument was given, as was the first, with the purpose and intent on the part of the makers thereof to delay, hinder and defraud their creditors of whom were the said The Christian Moerlein Brewing Company, Teuscher & Co., Anderson & Nelson Distilleries Company and Freiberg & Workum—and was accepted by plaintiff with knowledge on his part of the said intent of the makers thereof to thereby delay, hinder and defraud their creditors, and especially the said plaintiff creditors and the said

intent of said makers of said instrument was then and there well known to those named therein as preferred creditors, none of whom ever accepted it, and the said instrument was and is as to said omitted creditors and as to each of them, and as to all persons and for any purpose, void, and interposed no lawful obstruction to levy of said writ of attachment and the proceedings thereunder had or complained of; and plaintiff is now notified to produce the said instrument, and, also, the said first instrument, to be used in evidence on the trial of this suit.

That each of said instruments, in form and substance as signed executed and delivered by the makers thereof as hereinbefore averred, was and is fraudulent and void as to the creditors of the makers thereof, and especially as to the above-named omitted creditors and as to each of them, and was made with intent to delay, hinder and defraud said creditors, and especially said omitted creditors, in that among other things, and in addition to the said authority and powers created by the second instrument, and the said fraudulent conduct of the parties thereto with respect to both instruments:

92 First. It vests in the said plaintiff, trustee therein, named, the power and discretion to sell said property upon credit.

Second. It vests in said trustee the power and discretion to sell said property in parcels, or as an entirety, at public or private sale.

Third. It vests in said trustee the power and discretion to remove from the reach of creditors the whole of said property, by sale thereof on time for negotiable promissory notes, and the sale of such notes to good-faith purchasers for value.

Fourth. It vests in said trustee the power and discretion to compound, adjust, compromise and settle, or to sell, transfer and assign such debts, claims or demands as may be disputed, or be in doubt, or be of a doubtful nature, and to determine of and for himself what is disputed, in doubt or doubtful.

Fifth. It vests in said trustee the power and discretion to prolong indefinitely the execution of said trust.

Sixth. It charges said property with the burden of counsel fees throughout the whole period employed by said trustee, in his discretion, in executing said trust.

Seventh. It conveys to the said trustee to secure debts, the character, terms, conditions and amounts of which are not disclosed, a large amount of property, including all debts, demands, notes or accounts due to the said makers thereof, and conceals the value of said property, and the character, terms, conditions and amounts of said debts, demands, notes and accounts so conveyed.

Eighth. It conveys to said trustee property already sold, shipped and delivered by the makers thereof, and that may be thereafter acquired by them.

Ninth. It was never accepted by any of those named therein as preferred creditors.

Tenth. The makers of said instrument did not upon the execution and delivery thereof, nor afterwards, deliver to said trustee, nor did he receive of them the exclusive possession of said prop-

erty; nor did said trustee then, or afterwards, assume exclusive ownership, management, control or direction of said property in accordance with the terms of said instrument; nor did said makers then, or afterwards, withdraw themselves from said property and the direction, management and disposition thereof.

93 Eleventh. The makers of said instrument, shortly prior to, and in anticipation of the execution thereof, and with the formed intent to thereby delay, hinder and defraud their said creditors, and as a part and in pursuance of the fraudulent conspiracy hereinafter averred, and long theretofore formed, being insolvent and knowing themselves to be so, and for the purpose of establishing a false credit with their creditors, and especially with said brewing company, and enabling themselves thereby to make greater purchases of goods, and obtain greater credit from their said creditors, and especially from said brewing company, to wit: on or about October 12, 1892, falsely and fraudulently represented to Bradstreet's and Dun's commercial agencies in said city of Galveston, and to said brewing company, that they were solvent, and owned and possessed unexempt and available property of the net worth and value of $208,425, over and above all their liabilities, and thereby, with said fraudulent intent, procured themselves to be falsely rated on the lists of said agencies as owning and possessing unexempt and available property of said net value, in excess of all liabilities of $208,425.

Said commercial agencies were and are operated for the purpose of procuring and reporting to all those engaged in commercial business the true financial condition and standing of others so engaged; and *its* reports were and are received as correct and constitute the principal basis upon which credits are extended by and to those so engaged.

Misleading and deceiving said brewing company by said rating so procured and coming to its knowledge in the usual course, and by said false representations made to it and by other acts and pretences of solvency done and made in pursuance of said conspiracy hereinafter averred, the said makers of said instrument, being then largely indebted to said brewing company, purchased of said brewing company, and said brewing company sold and delivered to them, on credit, during the months of October, November and December, 1892, a large quantity of valuable goods, greatly exceeding in quantity and value, the latter aggregating $—, former purchases so made during like periods, which said company would not have sold them

94 but for the deceit practiced on it by said rating so falsely and fraudulently procured and by said other acts and pretences of solvency; and upon similar representations and by said other acts and pretences, other excessive purchases were made by them of other dealers and creditors not named in said instrument.

Twelfth. The makers of said instrument, being insolvent, conveyed to said trustee property largely in excess of the amount of the debts thereby secured, with the fraudulent intent to realize said excess in money for their own account and remove it from the process available to their said creditors, and thereby to delay, hinder and defraud their creditors.

Thirteenth. The makers of said instrument, being insolvent prior to the execution thereof, secured by other property and by the endorsements of solvent third parties, the debts of the persons named as beneficiaries therein, and by said instrument devoted said property therein named to the further security of said persons, with the fraudulent intent of covering and removing it from the reach of other said creditors and of thereby delaying, hindering and defrauding said creditors.

Fourteenth. The makers of said instrument, being insolvent, contemporaneously with or about the time of the execution thereof, conveyed by deed to L. Fellman, the father-in-law of said Seinsheimer, a large quantity of real estate in said Galveston county and elsewhere in said State, upon feigned considerations, but really in secret trust to him to hold for their account, for the purpose of removing said real estate from the process available to their said creditors and protect it from them, and with intent to delay, hinder and defraud them—said Fellman having full knowledge of said insolvency of said makers of said instrument.

Fifteenth. The makers of said instrument, being insolvent, and knowing themselves to be so and known by said Fellman to be so, contemporaneously with or about the time of the execution thereof, conveyed by deed to said Fellman a large quantity of real estate in said Galveston county and elsewhere in said State of Texas, of great value, for the purpose and with the intent on the part of all parties thereto of removing said real estate from the process
95 available to their said creditors and protecting it from them, and to delay, hinder and defraud them.

Sixteenth. The makers of said instrument, being insolvent and knowing themselves to be so, contemporaneously with or about the time of the execution thereof, placed in the hands of others than the parties to said instrument a large amount of the assets of said firm of Freiberg, Klein & Co., without consideration and in secret trust to hold, convert or realize upon same for account of said firm, for the purpose and with the intent of removing said assets from process available to their said creditors and protecting said assets from them and to delay, hinder and defraud them; but said disposition of said assets was made secretly and defendant has not been able to ascertain, and is therefore unadvised and cannot allege what assets were so disposed of nor to whom.

Seventeenth. The makers of said instrument, being insolvent and knowing themselves to be so, contemporaneously with or about the time of the execution thereof, made and delivered to H. Kempner of the city of Galveston, a mortgage or trust deed, purporting to convey to one Eckford, of the city of Dallas, as trustee, to secure a debt by note held by said Kempner and owing by them of about $5,000, certain property in said city of Dallas, State of Texas, known as Randall's café and Glen Lea saloon, of the value of about $7,500; whereas, in fact said note was not a subsisting debt against said makers of said instrument and had been theretofore fully satisfied and paid, and nothing was due said Kempner on account thereof.

That said mortgage or trust deed was made and delivered for the purpose and with the intent on the part of all the parties thereto of covering and concealing said property from said brewing company and other creditors of said makers thereof, and removing it from the process available to said creditors, and protecting it from them, and to delay, hinder and defraud them.

Eighteenth. Long prior to the making of said trust deed to plaintiff, the said firm of Freiberg, Klein & Co. and the said members thereof were hopelessly insolvent, and said Fellman had endorsed for and become bound with them in a large amount upon debts owing by them to certain of their home creditors, being those
96 named in said trust deed. Realizing, as the fact was, that their indebtedness and embarrassments were so great and their insolvency so hopeless that they must soon be forced to suspend payment of their matured and maturing debts and to discontinue business, an agreement and conspiracy was had and entered into by and between them and said Fellman that they should arrange to remove a then present, emminent and threatening embarrassment arising from their relations to some of their creditors, and, this being effected, proceed to increase their stock by large credit purchases and thus put themselves in readiness to, and to in fact, discontinue and fail in their business at such time thereafter as they and said Fellman should consider best suited to the making of said transfer or disposition of their goods and assets whereby he and said other home creditors, to whom he and said firm were bound for large sums, could realize the full amount of their claims, to the exclusion and in fraud of all other creditors, and Freiberg, Klein & Co. could secure and realize for themselves whatever values remained of said goods and assets after satisfying said Fellman and said other home creditors. Said agreement and conspiracy were thenceforward executed on the part of said Freiberg, Klein & Co. by continuance in business upon false and fraudulent pretences of solvency and large capital and the purchase of large quantities of goods from dealers, including said plaintiffs in attachment, upon faith of said dealers in the truth of *sale* false and fraudulent pretences, with the said fraudulent view and purpose—knowing they could not and intending never to pay therefor; and on the part of said Fellman by arranging his affairs with reference to said contemplated discontinuance and failure in business and transfer and disposition of said goods and assets, with said fraudulent view and purpose; and said agreement and conspiracy culminated in the execution and delivery of said trust deed to plaintiff, who had been long theretofore selected by said Fellman to be named as trustee; and although said instrument purports to have been made to secure the debts therein named, yet in truth and in fact the same was made in furtherance and pursuance of said aforesaid fraudulent purpose and conspiracy had and entered into as aforesaid between said Freiberg,
97 Klein & Co. and said L. Fellman and to secure him against his liability for said debts arising from his said endorsement and guaranty thereof and with the full knowledge and active operation and assistance of him, the said Fellman, and at his urgent en-

treaty and request and with the fraudulent intent and purpose to hinder, delay and defraud the said creditors of said Freiberg, Klein & Co. not named in said instrument.

And the matters of this plea said defendant is ready to verify. Wherefore he prays judgment, etc., etc.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
*Counsel for Defendant.*

EXHIBIT 1.

STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas we Moses Freiberg and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in said State of Texas, partners doing business under the firm name and style of Freiberg, Klein & Co., are justly indebted to sundry persons in sundry amounts and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible and in the order and manner hereinafter provided; now therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we, the said Moses Freiberg, and Joseph Seinsheimer, and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over and transferred, and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer, unto Jacob Sonnentheil, also of the city of Galveston, all and singular the following-described personal property, debts, claims, accounts, assets and the evidences thereof, to wit:

98 All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julien Freiberg, on the south side of Avenue B, or Strand street, in block No. 624, in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block No. 624 and fronting on Avenue C, or Mechanic street, in said city, and also in the United States custom warehouse and storehouse in the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glassware, and such other articles of merchandise as are usually kept for sale by and in wholesale liquor store, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in upon and about the premises aforesaid or any of them.

Also, all and singular the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description, belonging to us, and situated or contained in or upon the premises aforesaid and used or kept for

sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular the ice boxes and faucets and cash register, belonging to us, and contained in or upon the said premises or any of them, or in the hands or possession of our various customers in the city of Galveston aforesaid, of which said articles so in the hands or possession of our said customers, their several and respective receipts *as* on file in our office and are herewith delivered to the said Jacob Sonnenthiel.

Also, fourteen head, more or less, of horses and mules, being all the animals belonging to us and used in connection with and in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B, or Strand St.

Also, all those certain two buggies and one float and one delivery wagon and all harness, belonging to us and used in the course of and in connection with our said business and usually kept in or about the said stable or shed.

99 Also, 700 halves and quarter kegs of beer, more or less, now situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, contained in their building on the corner of 20th street and Avenue A, in the city and county of Galveston aforesaid, and comprising all the beer owned by us now contained in said building.

Also, all goods, wares and merchandise or other personal property heretofore used by us in the course of our said business, sold, shipped or delivered to our customers or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us on account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands may be or exist, whether by or upon bills, notes, open account or otherwise, together with all and singular the evidences thereof, including all bills, notes, vouchers, books of account and documents of every description pertaining to or containing evidence of such debts, claims and demands, or the transactions in which the same accrued.

Also, all and singular the unexpired insurance contracts and policies heretofore effected and still of force upon the property hereby conveyed, or any part thereof.

Also, all and singular *as* our unexpired license as wholesale or retail dealers in liquors, cigars or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall — and he is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets and value and the evidences thereof hereinbefore mentioned and as speedily as possible

sell and convey the said personal property in parcels or as an entirety at public or private sale, and collect the said debts, claims and demands and out of the proceeds realized therefrom he shall pay first all expenses by him reasonably incurred or paid out in
100 the execution of this trust including the rent of premises, the hire pay and fee of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself for his own services to be rendered in this behalf, and secondly the following debts owing by us, each in the order here set down and in full before those which come after:

| | |
|---|---|
| Amount owing to A. W. Fly, temporary administrator about..... | $3,913 91 |
| Amount owing to B. Kahn about..... | 1,598 60 |
| Amount owing to the Island City savings bank holder or holders and on account of our four (4) certain promissory notes for the sum of $5,000 each and payable to the order of said bank..... | 20,000 00 |
| Amount owing to the Island City savings bank or other holder, and on account of our certain promissory note for the sum of $5,500, payable to the order of said bank..... | 5,500 00 |
| Amount owing to the Island City savings bank or other holder, and on account of our certain promissory note payable to the order of said bank for..... | 4,000 00 |
| Amount owing to the First National Bank of Galveston or other holder, and on account of our five (5) certain promissory notes payable to the order of said bank, each for the sum of $5,000.00..... | 25,000 00 |
| Amount owing to the American National Bank of Galveston, Texas, or other holder or holders, and on account of our three (3) certain promissory notes, each for the sum of $5,000.00 and payable to the order of said bank..... | 15,000 00 |
| Amount owing to the said American National bank or other holder and on account of our certain promissory note payable to the order of said bank for the sum of..... | 2,500 00 |
| Amount owing to Adoue & Lobit, of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000 and discounted with said Adoue & Lobit..... | 10,000 00 |
| Amount owing to said Adoue & Lobit or other holder and on account of our two (2) certain promissory notes each for the sum of $2,500 and discounted with said Adoue & Lobit..... | 5,000 00 |
| 101 Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000.00, payable to the order of the said Citizens' Loan Company..... | 10,000 00 |

Amount owing to G. Ketch or other holder and on account of our certain promissory note payable to the order of said G. Ketch for the sum of..... 5,000 00

Amount owing to Mrs. A. Lowenstein or other holder and on account of our certain promissory note payable to the order of the said Mrs. A. Lowenstein for the sum of..... 3,000 00

Amount owing to S. A. Walker or other holder or holders and on account of our three promissory notes each for the sum of $5,000, payable to the order of ourselves ... ..... 15,000 00

Amount owing to the Irwing National Bank of New York or other holder or holders of and on account of our three (3) certain promissory notes each for the sum of $5,000, payable to the order of said bank.... ..... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification, other descriptive items when given are from recollection and belief only and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing on the debt mentioned, whether such amounts be stated exactly or not are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil in the order above given and stated; and in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof shall remain, the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assignee.

And all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conveyed on him
102 shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust and no purchaser of any such property nor any debt-making payments to the said Jacob Sonnentheil shall stand charged to see to the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on p. 3rd expunged before signing.)

In testimony of all of which we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents, at Galveston, Texas, this sixteenth day of December A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

Proper acknowledgment before James Spillane.
Filed Dec. 16, '92.

A. WAKELEE.
H. C. JOHNSON, *Deputy.*

Indorsements: No. 1702. U. S. circuit court, Galveston. Jacob Sonnentheil *v.* J. J. Dickerson, marshal, *et al.* Defendant Dickerson's second amended original answer. Filed Oct. 26, 1895. C. Dart, clerk. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, counsel.

*Order: 1st Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 30th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and both parties announcing ready for trial, thereupon came
103 on to be heard the defendants' demurrer to the jurisdiction of the court in this case, and the said demurrer having been heard and argued by counsel on behalf of the defendants, as well as on behalf of the plaintiff, before the court and the court being sufficiently advised,

It is considered and ordered by the court that the said demurrer be overruled; to which ruling the defendants then and there excepted.

And the issues being joined, thereupon came a jury of twelve good and lawful men, to wit:—

| | | |
|---|---|---|
| H. A. Landes, | Geo. C. Davis, | John Knight, |
| R. H. Jackson, | J. B. Holick, | I. D. Polk, |
| Jas. E. Kane, | Hal G. Land, | H. W. Oneken, |
| Henry Voss, | P. J. Krause, | Wm. H. Colbert, |

who being duly elected, tried, empaneled and sworn, and accepted by the parties as a good and lawful jury to try the issues between them in this suit; thereupon the trial of the case proceeded before the court and jury, but the trial not being concluded, the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*Order Appointing Stenographer.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 30th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

Upon application of the defendant, it is ordered that L. J. Selby be, and he is hereby appointed stenographer to take and return the testimony to be given upon the trial of this case; his compensation in the first instance to be paid by the defendants, and ultimately to be taxed as costs against the losing party; and thereupon the said Selby was duly sworn.

104 *Order: 2nd Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, October 31st, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury, but the trial not being concluded the further trial of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*Order: 3rd Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 1st, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury, but the trial not being concluded, the further trial of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*Order: 4th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 2, 1895.

105 JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury, but the trial not being concluded the further trial of the case was postponed until Monday morning next, and the jury permitted to disperse under instructions from the court.

*Order: 5th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 4, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded the further consideration of the case was postponed until tomorrow and the jury permitted to disperse under instructions from the court.

*Order: 6th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 5th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

106 On this day came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded, the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*Order: 7th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 7th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded the further trial of the case was postponed until tomorrow and the jury permitted to disperse under instructions from the court.

*Order: 8th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 8th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded, the further consideration of the case was postponed until tomorrow and the jury permitted to disperse under instructions from the court.

107 *Order: 9th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 9, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded, the further consideration of the case was postponed until Monday morning next, and the jury permitted to disperse under instructions from the court.

*Order: 10th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 11th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 17-2.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded, the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*Order: 11th Day's Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 12, 1895.

108 JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury; but the trial not being concluded, the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

*General Charge Asked by Plaintiff and Refused.*

Filed Nov. 13, 1895.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL
*vs.*
MOERLEIN BREWING CO. *et al.* }

Plaintiff asked the court to charge the jury as follows, viz:

The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, the *bona fide* debts of the makers, Freiberg, Klein & Co.

It has been further shown that some of the creditors named

therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff who was at the time lawfully in possession of them under said deed and converted them to the use of said brewing company. You are therefore
109 instructed to find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of six per cent. per annum from the date of such seizure to the date of your verdict.

Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Attorneys for Plaintiff.*

Indorsements: "No. 1702. J. Sonnentheil *vs.* Christian Moerlein Brewing Co. *et al.* General charge asked by pl't'ff. Filed Nov. 13, '95. C. Dart, clerk. Refused. Bryant, judge."

*Charges Asked by Plaintiff.*

Filed Nov. 13, '95.

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

J. SONNENTHEIL
*vs.*
MOERLEIN BREWING CO. *et al.*

Should the court refuse to give the general instruction asked in favor of plaintiff then and only in that event, the plaintiff asks the court to charge the jury as follows:

1.

If the plaintiff in this suit is entitled to recover against the defendants, he is entitled to recover the market value of the property taken from him by the defendants under the writ of attachment levied on Dec. 23, 1892, together with interest from that date at the rate of six per cent. per annum.

110 The market value of the property above referred to is not the value of the property in a distant market or markets plus the cost of transportation to Galveston. Neither is it what the property brought at the auction sales by the marshal. By it is meant the reasonable market selling value at wholesale of the said property at the time and place of the seizure under the attachment.

2.

If you believe that said deed of trust was made for the sole purpose and with the sole intent to secure or pay the debts recited therein, and that one or more of the recited creditors accepted the same before the levy of the attachment, you will find for the plaintiff.

3.

Again, if you believe that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay or defraud their creditors, but that one or more of the beneficiaries named therein accepted the deed of trust before the levy of the attachment without notice of such intent you will find for the plaintiff.

4.

On the question of alleged fraudulent intent on the part of Freiberg, Klein & Co., I instruct you that although insolvent, they had a right to prefer certain favored creditors over others less favored, and that if their purpose was simply to secure or pay the favored creditors their deed of trust would not be fraudulent or invalid merely because it postponed or even defeated the claims of their creditors who were not preferred.

5.

On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts as would have caused a reasonably prudent man to have in-
111 quired into such intent and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them on inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent then they would not be chargeable with notice of such intent, unless they had knowledge of it.

6.

On the question of acceptance I charge you that none of the creditors by the deed of trust were required to accept in writing. Neither were they required to use the word accept in accepting the deed of trust. A creditor who communicated to the trustee or to Freiberg, Klein & Co., his willingness to accept the security and

benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City savings bank, the Citizens Loan Company and the First National bank, and he had authority from them either expressed or implied to do so, the said corporations accepted. In considering his authority, you will consider the offices he held, his previous conduct of said offices and the sanction if any accorded by the said corporations to his acts of similar nature and to his acceptance, if any, in this matter.

6a.

The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument.

7.

The fact that a debt secured by a deed of trust is also
112 secured by personal endorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as an endorser upon his claim, when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman or Fellman & Grumbach may have been guilty of fraud must not affect your verdict, if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's endorsement.

The fact that Fellman or Fellman & Grumbach may have, subsequent to the attachment paid off some of the claims secured by their endorsement must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account of the claims they have paid, that is a matter that cannot be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose.

8.

I have necessarily admitted evidence, which, at the time it was offered I could not foresee the relevancy of. Such for example as the testimony relating to Seinsheimer's misconduct towards his partners and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff.

113

9.

If you believe that before the levy of the attachment any one creditor named in the deed of trust, accepted it without notice of the alleged frauds charged against other parties, you will find for the plaintiff the reasonable wholesale market — of the entire property attached, with interest at the rate of 6 per cent. per annum from Dec. 23rd, 1892.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Plaintiff.*

Indorsements: "No. 1702. J. Sonnentheil *vs.* Christian Moerlein Brewing Co. *et al.* Charges asked by plaintiff. Filed Nov. 13, '95. C. Dart, clerk. Refused. Bryant, judge."

*Charge No.* 1 *Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, *et al.* } No. 1702.

Charge No. 1 requested by defendants.

Defendants claim that they are not liable in this case because they say that Freiberg, Klein & Co. made the trust deed with intent to delay, hinder or defraud their unpreferred creditors, and that the trust deeds were therefore void as to their unpreferred creditors. The question of fraud raised by this defence is for you to decide; and in determining it you will consider the language and terms of the deeds themselves and the circumstances preceding, attending and following their execution, and all acts of the parties and all other facts and circumstances in evidence.

If you believe from the evidence that Freiberg, Klein & Co. made the trust deeds with intent to delay, hinder or defraud their
114 unpreferred creditors by covering the property therein named or any part of it, or the proceeds of any part of it, from said creditors and to secure it for themselves, no matter in what manner

such intent was to be realized, then you will find for the defendants.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
J. B. STUBBS,
*Counsel for Def'ts.*

Indorsements: "No. 1702. U. S. C. C., Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Charge No. 1 requested by defendants. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, J. B. Stubbs, counsel for defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge No. 2 Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, *et al.* } No. 1702.

Charge No. 2 requested by defendants.

The plaintiff cannot recover in this suit for or on account of any debt named in the trust deed which has been paid by him, or by Fellman & Grumbach or either of them.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
J. B. STUBBS,
*Counsel for Defendants.*

Indorsements: "No. 1702. U. S. C. C., Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Charge No. 2
115 requested by defendants. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, J. B. Stubbs, counsel for defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge 3 Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. Circuit Court.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON *et al.* } 1702.

If the jury believe from the evidence that Jacob Sonnentheil was not in the exclusive possession of the stock of goods, the value of

which is sued for in this case, at the time of their seizure by the marshal, and that Frieberg, Klein & Co. were not excluded from such possession, but shared the same with said Sonnentheil, then your verdict should be for the defendants.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT, AND
J. B. STUBBS, *Att'ys for Def'ts.*

Indorsements: "1702. U. S. circuit court. Sonnentheil *v.* Dickerson *et al.* Charge 3 requested by defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge No. 3a Asked by Defendants.*

Filed Nov. 13, 1895.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON *et al.*

If the jury believe from the evidence that the title and real ownership of the property, the value of which is sued for in this case, remained in Frieberg, Klein & Co., and that the transfer of
116 said property to Sonnentheil was only colorable and not intended to pass the title thereto to said Sonnentheil, but to place the property beyond the reach of any of the creditors of Freiberg, Klein & Co., and that said Sonnentheil did not take or have exclusive possession of said property at the time of the levy thereon by the United States marshal, then you will find a verdict for the defendants.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT, AND
J. B. STUBBS,
*Att'ys for Defendants.*

Indorsements: "1702. U. S. circuit court. Sonnentheil *v.* Dickerson *et al.* Charge 3*a* requested by defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hancom, deputy. Refused. Bryant, judge."

*Charge 3b Asked by Defendants.*

Filed Nov. 13, 1895.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON *et al.*

The jury are instructed, that by the terms of the deed of trust made by Freiberg, Klein & Co. to Sonnentheil, said Sonnentheil is authorized to sell the property therein conveyed to him, on a credit,

and if you believe that it was the purpose of said Sonnentheil to sell said property on a credit, in parcels, to various persons, then you are instructed that said deed of trust is wholly void as to creditors of Freiberg, Klein & Co. and your verdict should be for the defendants.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT, AND
J. B. STUBBS,
*Att'ys for Defendants.*

Indorsements: "1702. U. S. circuit court. Sonnentheil
117 *v.* Dickerson *et al.* Charge 3*b* requested by defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge No. 4 Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICK-RSON, Marshal, *et al.* } No. 1702.

Charge No. 4 requested by defendants.

If you believe from the evidence that in the making of the trust deed Freiberg, Klein & Co. intended to cover and shield the property therein named or any part of it, or the proceeds of any part of it, from their unpreferred creditors and to secure it for themselves either by retaining, in whole or in part, the continuing ownership, control or beneficial use of it or its proceeds, notwithstanding the terms of the trust deed; or by effecting a settlement with their said creditors by means of the use, sale or other disposition of the property by plaintiff, or by means of the subsequent acquisition of the property by Fellman or some other person and its use, sale or other disposition by Fellman or such other person for the benefit in whole or part of Freiberg, Klein & Co., or by its use, sale or other disposition, under the name of Fellman or such other person, by Freiberg, Klein & Co., and for their benefit in whole or part; and if you do not believe from the evidence that before the writ of attachment was levied by the marshal, Adoue & Lobit accepted the trust deed and became bound to abide by it as their contract; or, if, believing that they did so accept it, you further believe from the evidence that at the time of such acceptance they had notice of said intent on the part of Freiburg, Klein & Co., or could have acquired such notice by using such care, diligence and inquiry as a man of ordinary prudence would use under the circumstances, then the plaintiff cannot recover for or on account of Adoue & Lobit.

118 If you believe from the evidence that Freiberg, Klein & Co. in the making of the trust deed had the intent above defined; and if you also believe that Adoue & Lobit accepted the trust deed before the writ of attachment was levied and became bound to abide by it as their contract, and that at the time of such acceptance they had no notice of said intent on the part of Freiberg, Klein & Co. and could not have acquired such notice by using such care, diligence and inquiry as a man of ordinary prudence would use under the circumstances—still the plaintiff cannot recover on account of Adoue & Lobit, if he has in his hands enough money derived from property named in the trust deeds to pay the debts of Adoue & Lobit; or if he has expended money derived from any property named in the trust deeds in paying in whole or in part the debt of any beneficiary or beneficiaries named in the trust deeds who did not accept said trust deed before the levy of the attachment and become bound by such acceptance, or who accepted the trust deed with notice or means of notice of said intent of Freiburg, Klein & Co. in making them, and the amount of money so expended together with the money he has on hand is enough to pay the debt of Adoue & Lobit; and if such money is not sufficient to pay in full the said debt of Adoue & Lobit, the plaintiff cannot recover for a greater sum than the difference between the amount of such money and the amount of said debt of Adoue & Lobit.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
J. B. STUBBS,
*Counsel for Defendants.*

Indorsements: "No. 1702. U. S. C. C., Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Charge No. 4 requested by defendants. Lovejoy & Sampson, Hume & Kleburg, Labatt & Labatt, J. B. Stubbs, counsel for defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

119 *Charge No. 5 Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, *et al.* } No. 1702.

Charge No. 5 requested by defendants.

If you believe from the evidence that in the making of the trust deed Freiberg, Klein & Co. intended to cover and shield the property therein named or any part of it, or the proceeds of any part of it, from their unpreferred creditors and to secure it for themselves—either by retaining, in whole or part, the continuing ownership,

control or beneficial use of it or its proceeds, notwithstanding the terms of the trust deed; or by effecting a settlement with their said creditors by means of the use, sale or other disposition of the property by plaintiff, or by means of the subsequent acquisition of the property by Fellman or some other person and its use, sale or other disposition by Fellman or such other person for the benefit in whole or part of Freiberg, Klein & Co., or by its use, sale or other disposition under the name of Fellman or such other person, by Freiberg, Klein & Co. and for their benefit in whole or part; and if you further believe from the evidence that Fellman & Grumbach, or either of them, participated in or had notice of, said intent of Freiberg, Klein & Co. in the making of said trust deeds—then the plaintiff cannot recover for or on account of Fellman & Grumbach, or either of them.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
J. B. STUBBS,
*Counsel for Defendants.*

Indorsements: "No. 1702. U. S. C. C., Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Charge No. 5 requested
120 by defendants. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, J. B. Stubbs, counsel for defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge No. 6 Requested by Defendants.*

Filed Nov. 13, 1895.

U. S. C. C., Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON, Marshal, *et al.* } No. 1702.

Charge No. 6 requested by defendants.

If you believe from the evidence that in the making of the trust deed Freiberg, Klein & Co. intended to cover and shield the property therein named or any part of it, or the proceeds of any part of it, from their unpreferred creditors and to secure it for themselves—either by retaining, in whole or in part, the continuing ownership, control or beneficial use of it or its proceeds, notwithstanding the terms of the trust deed; or by effecting a settlement with their said creditors by means of the use, sale or other disposition of the property by plaintiff, or by means of the subsequent acquisition of the property by Fellman or some other person and its use, sale or other disposition by Fellman or such other person for the benefit in whole or part of Freiberg, Klein & Co., or by its use, sale or other disposition, under the name of Fellman or such other person, by Frei-

berg, Klein & Co. and for their benefit in whole or part and if you believe from the evidence that any beneficiary named in said trust deed had, at the time of the delivery thereof by Freiberg, Klein & Co. to the plaintiff, notice of such intent of Freiberg, Klein & Co., then you will find a general verdict for the defendants, although you may believe from the evidence that some other beneficiary named in the trust deed accepted it in good faith and without notice of such intent of Freiberg, Klein & Co.

LOVEJOY & SAMPSON,
HUME & KLEBERG,
LABATT & LABATT,
J. B. STUBBS,
*Counsel for Defendants.*

121 Indorsements: "No. 1702. U. S. C., Galveston. Jacob Sonnentheil *vs.* J. J. Dickerson, marshal, *et al.* Charge No. 6 requested by defendants. Lovejoy & Sampson, Hume & Kleberg, Labatt & Labatt, J. B. Stubbs, counsel for defendants. Filed Nov. 13, 1895. C. Dart, clerk, by W. L. Hanscom, deputy. Refused. Bryant, judge."

*Charge of the Court.*

Filed November 13, 1895.

U. S. Circuit Court, Eastern District of Texas.

JACOB SONNENTHEIL *vs.* J. J. DICKERSON *et al.* } No. —. Equity.

Charge of the court to the jury.

GENTLEMEN OF THE JURY: On the 16th day of December, 1892, the firm of Freiberg, Klein & Co. executed a deed of trust to Jacob Sonnentheil as trustee, and transferred to him all of their property, practically, I think in whole so far as that is concerned, for the purpose of securing certain creditors named in the deed of trust to be paid in the order therein named. On the 23rd day of December, 1892, the Christian Moerlein Brewing Co. instituted a suit and sued out an attachment, and the attachment was levied upon the property covered by this deed of trust, that is not the open accounts and notes and things of that kind—they were not subject to levy, but upon property that has been stated to you in the presentation of this case, personal property, which the marshal's return will show more definitely. On January 25, 1893, Jacob Sonnentheil, as such trustee, filed a suit against J. J. Dickerson and the other defendants herein for damages resulting to him, as such trustee, by reason of the levy upon this property and taking it from his possession, and that is the plaintiff's case now before you. He claims that by virtue of the deed of trust that has been offered in evidence and read in evidence that this property was vested in him, and as such trustee he had the legal right to the possession and control and disposition of that property, to carry out the trust expressed in that deed.

122 The defendants have answered by a general denial, placing the burden of proof upon the plaintiff, to prove the material facts of his case, and they have also specially answered, they claiming, among other things, that there were certain badges of fraud upon the deed of trust that was made, not claiming these badges rendered void the instrument upon its face, but these badges of fraud coupled with other evidence made it fraudulent in fact. They also claim that Mr. L. Fellman, and also the firm of Fellman & Grumbach, were endorsers for the firm of Freiburg, Klein & Co. upon a large amount of paper, amounting to over $100,000, and that in order to secure these endorsers that a conspiracy was formed between Fellman and Freiburg, Klein & Co. by which it was designed that they would swell their credit and procure goods and in that way keep off the crash and they could prefer themselves in order to save Fellman & Grumbach. They further allege this conspiracy was known to the holders of this paper, or if it was not known that the circumstances were such that by the use of reasonable diligence, or the diligence that a reasonably prudent person would exercise, they could have known, and therefore the instrument was fraudulent. They also claim that the parties that were named in this deed of trust, that were preferred, had not accepted the deed of trust prior to the levy of the attachment, and, therefore, the trustee did not have the title to the property by which he could maintain the suit. These are not the defences in full, but they are the substantial defences, as I understand them, as presented by the defendants.

I have inspected this deed of trust, and my opinion is that upon its face it is a legal instrument; that upon the execution and delivery of that instrument to Mr. Sonnentheil, that it vested the title in Mr. Sonnentheil—the title therein named—for the purposes therein named. A deed of trust in this State, under the decisions is different from an assignment. An assignment itself presumes that all the creditors named accepted it. In order to make a deed of trust operative it is necessary that the parties for whose benefit it is made should accept it. It is not necessary that the acceptance should be in writing, nor is there any particular form of acceptance.

123 By the term acceptance it is simply meant that when they understand what has been done that they consent to it, they agree to it, no matter in what form that may be done; anything that shows that after being informed of what has been done, that with a knowledge of these facts they assent to it, or they agree to it, constitutes and is, in fact, an acceptance.

Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before the attachment is levied, the trustee cannot recover, but if any creditor has accepted the terms of that instrument before the attachment has been levied, the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you, and ably upon both sides—well presented by the attorneys for the parties on both sides—the contention has been that even if some one creditor did accept, that the trustee

could recover only to the extent of the debt thus accepted; the other party has contended that that was not the law, we being in a court of law, that you could not marshal assets and have an adjustment of the equities, that consequently it was legal or illegal. I agree with the latter contention. I hold as a matter of law that if you find as a matter of fact that if any creditor accepted the terms of this instrument before the levy of the attachment and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed, the entire property named in this deed passed to the trustee, and for this action he may recover for whatever *they* it may be shown the property was worth at the time and place it was taken.

Upon the question of fraud I will read you this from the statutes: "Art. 2465. Every gift, conveyance, assignment, or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers, or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consid-
124 eration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

Another contention in this case has been that the fraud mentioned by the statute applies only to grantors, that is, Freiberg, Klein & Co. They had contended, that if the evidence showed to the satisfaction of the jury that Freiberg, Klein & Co. intended to defraud their creditors, that was sufficient to void the instrument. I held the law to be otherwise. In order to set aside an instrument executed by one party to secure the just debts to another party, in order to avoid that instrument it is necessary that the evidence should show that the party making the instrument was guilty of fraud himself and the party in whose favor it was made either had actual knowledge of the fraudulent intent, or from the circumstances surrounding the transaction and the evidence taken as a whole would show and indicate that he knew the fraudulent intent, or that he was possessed of information which would put a reasonably prudent person upon inquiry, and if that inquiry had been properly followed it would have led to the knowledge that the instrument was fraudulent. In other words, where a party *that* is insolvent or in a failing condition, under the laws he has a right to prefer creditors, he has a right to pay one creditor in preference to another if he sees proper to do so, and in doing that in order to avoid the instrument upon the ground of fraud the jury must believe the testimony that the party making the instrument was guilty of fraud himself and the par*ties* receiving the benefit of it, either was a party to the fraud or he was possessed of information (and by information I do not mean direct testimony, I mean circumstances surrounding the transaction) that would indicate to the mind of a reasonably prudent person that there was fraud in the transac-

tion. The natural effect of the instrument given that prefers certain creditors is to hinder and delay other creditors, that is the natural effect of it, but that is not the effect that avoids it, it requires more than that, it requires that the party in making the instrument had an intention not only to prefer this debt in fact, but he intended to acquire some ulterior benefits to himself, he might intend
125 to convey a large amount of property to a trustee with intent of having sold in bulk and for less than its value and buy it in some other person's name for his benefit. And he might have reason by which he might buy this property in bulk and hold it in the name or some other party so he could read an interest or benefit from it; he might have some other fraudulent intention, and some other intention must exist than the mere effect—than it is hindering and delaying other creditors.

Now in this case it is insisted if Mr. Fellman was the endorser upon this paper, they insist that the conspiracy was entered into between Fellman and the firm of Freiberg, Klein & Co., by which these goods were to be purchased, and with the view and for the purpose of not selling for cash, and the liability of Fellman & Grumbach removed—that a deed of trust would be made by which they would receive the benefits. If you believe that to be true, as a matter of fact, in order that it should affect the right of Sonnentheil in this case his rights were fixed at the date of the deed of trust, which was the 23rd day of Dec. 1892, the status then was the question of his right then to recover, or his want or right to recover, and the subsequent acts would not affect it in any way whatever in my opinion. Consequently in determining that question, if you believe from the evidence as a matter of fact that Fellman & Grumbach, or either of them, did enter into a conspiracy with Freiberg, Klein & Co. or either of their firm to carry out a scheme of that kind, that would be a fraudulent scheme—one which the law would not tolerate; but you must further believe from the testimony that the party secured in the instrument either knew that such was the intention of these parties and such was their disposition, or you must believe they were in possession of facts and circumstances that would indicate to the mind of a reasonably prudent person if properly followed up would have brought to them the information that such was the conspiracy between the parties. Therefore you are instructed that in this case, if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment—which bear in mind was the 23rd Dec. '92—and you further believe from the evidence that any
126 creditor named in that instrument had accepted benefits of this deed of trust prior to the 23rd day of Dec., or on that date—prior to the levy of the attachment, and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from that testimony that creditor had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon

inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff and assess the damages at such sum as the evidence showed the property was worth at the time and place of its seizure, and upon that point I will instruct the market value of the goods was not what they might have been bought for from other places and shipped here, but the market value means the value of the goods where they were, what they consisted of and reasonably could have been sold for at a fair price, not under the hammer but in a legitimate proper course of business, without forced sale; that would be the measure of damages at that time, with 6% interest from the time of the levy or the seizure; but I instruct you further if you believe from the evidence in this case that the conspiracy was formed between—I instruct you first, if you don't believe these creditors accepted, or any of them, before the attachment was levied, you will return a general verdict for the defendant-; but if you find some of the creditors or any of them did or any of them before the attachment, then you are to inquire into the question whether fraud existed or not. If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you, then you are to extend your investigation, and if the fraud (if you find it) was fraudulent you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent, or whether they had information that would have led to the detection of the fraud that would have put a reasonably prudent person upon inquiry, and upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of the jury, that is what you are here for: the disputed questions of fact; you are the judges of weight of the evidence and the credibility of the witnesses and thus *thus* being the judges you are to determine who has told the truth and who has not, and in doing that, you have the right to take into consideration the interest of the parties, you have a right to take into consideration the manner of the witnesses on the stand; in fact, you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there, but do what you think is right and just under the law; you must regard the law as your guide, we all bow to it, whatever the law may be, otherwise there would be no law.

127

I mean, if you believe from the evidence that there is a single excepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonbly prudent person

upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now.

On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said excepting creditors knew of said fraud in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry in that event you will return a verdict for the defendants.

What I mean is this, if you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment, and that such creditor was not guilty of fraud himself,
128 and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff.

But, on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant.

In determining the question of fraud, you have the right to look to the fact that most of the parties lived in Galveston, two living at a distance, and some of them represented here in Galveston; and you have the right to look to the relations of the parties, and all the circumstances surrounding them, in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors if there were any knew of it or of facts that would have put a reasonably prudent person on inquiry.

If you find for the plaintiff, the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at — dollars (stating the amount), with 6 per cent. interest from the 23rd day of December, 1892" and date it and sign by your foreman.

If you find for the defendants, the form of your verdict will be: "We, the jury, find for the defendants" and date it and sign by your foreman.

Any of you gentlemen can act as foreman.

The instrument that was filed was executed on the 16th day of December, 1892. There was another deed of trust, dated the 17th day of December, 1892, which deed of trust differs in this particular. These words appear in the second instrument with reference to the notes and accounts: "Adjust, compromise or sell at public or private sale."

In the instrument of the 16th there was struck out, and it was inserted in the instrument of the 17th; and the clause I will now read was also added to the instrument of the 17th, which was not in the instrument of the 16th: "And we hereby covenant and agree with the said Jacob Sonnentheil and with the holders of the in-
129 debtedness hereby secured that we will make, execute and deliver to the said Jacob Sonnentheil, such other and further

transfers, assignments and assurances of title, in particular to any or all of said property and assets, as and when the same may be advised or required under advice of counsel, or as may be reasonably requisite or proper. In order to facilitate and expedite the execution of this trust by the said Jacob Sonnentheil *and* we do hereby authorize and empower each and every one of the said partners in the copartnership of Freiberg, Klein & Co., in the name of the said copartnership, and in the name, place and stead of each of said copartners thereto, to make, execute and deliver any and all such further transfers, assignments and assurances of title in particular, with like effect as though the same were made, executed and delivered by each of us in person. This instrument is made to secure the same indebtedness mentioned in a certain deed of trust in the nature of a chattel mortgage, made, executed and delivered by me to the said Jacob Sonnentheil under date of December 16, 1892, and intended to cover the same assets and property, and is designed to still further assure the speedy and convenient execution and performance of the same general purposes, and not to in anywise impair, but to confirm and increase the security given by the said deed of trust in the nature of a chattel mortgage hereafter executed, as aforesaid."

Gentlemen, my attention has been called to the fact that the second instrument was not recorded, and to the fact of the erasures and additions mentioned. As to the legal effect of these instruments, I think that upon their face, they are legal instruments, and that the causes complained of amounting to badges of fraud or signs of fraud, I think as they apply to this case do not amount to that.

The fact that the second instrument was not recorded is immaterial, because the plaintiff Jacob Sonnentheil, under the undisputed testimony was in the actual possession of the property and therefore it was unnecessary to record it. His possession would be notice to all attaching creditors. The continuing of the employés of Freiberg, Klein & Co. by the plaintiff would be a circumstance tending to show fraud, but it would not be sufficient within itself, but may be considered by you simply as a circumstance in connection with the other testimony in determining the question of intent with which the instrument was made.

I instructed you that corporations can only act through their agents, and in order for one of these corporations to have accepted this instrument, it must have been by a party that was expressly authorized by the company or by a party in the management of the business of the company that had ordinarily transacted such business, and that the corporation knew that the party had performed these acts and acquiesced in what he had done in the premises.

D. E. BRYANT, *Judge.*

We the jury find for the defendants.
Nov. 13, 1895.

I. D. POLK, *Foreman.*

Indorsements: "Jacob Sonnentheil *vs.* Christian Moerlein Brewing Co., *et al.* Charge of the court. Filed Nov. 13, 1895. C. Dart, clerk."

*Judgment.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 13th, 1895.

United States Circuit Court, Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL *vs.* THE CHRISTIAN MOERLEIN BREWING CO. and J. J. DICKERSON. } C. L., No. 1702.

WEDNESDAY, *November 13th*, 1895.

On this day again came the parties to this suit by their attorneys, and thereupon the trial of the case was resumed before the court and jury, and the trial concluded.

And the jurors aforesaid, duly elected, tried, impaneled and sworn in this case, and accepted by the parties as a good and lawful
131 jury to try the issues between them in this suit, to wit: I. D. Polk, and eleven others, having heard the pleadings and evidence and argument of counsel, and having received the charge of the court, retired to consider of their verdict: after due deliberation the jurors aforesaid returned into court, and in open court returned their verdict, as follows:

"We, the jury, find for the defendants.

I. D. POLK, *Foreman.*

November 13th, 1895."

Wherefore, it is considered by the court, and so ordered, adjudged and decreed that the plaintiff take nothing by his suit, and that the defendants go hence without day, and recover of and from the plaintiff all costs by them in this behalf incurred or expended, and have execution therefor.

It is further ordered that execution may issue against each party for the costs by them, respectively, incurred and unpaid.

*Plaintiff's Motion for a New Trial.*

Filed November 14, 1895.

In the Circuit Court for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL *vs.* J. J. DICKERSON *et al.* } No. —.

In this cause now comes the plaintiff, and moves the court to set aside the verdict and judgment in this cause rendered, because:

1st. The said verdict and judgment are contrary to the evidence and the great preponderance thereof, in this—that the evidence shows that at the date of the seizure of the goods, for the value of which this suit was brought, said plaintiff had good title thereto, and that the defendants in taking said goods from the possession of the plaintiff, were naked trespassers and mere wrong-doers, and the verdict and judgment should have been for the plaintiff.

132 2nd. The said verdict is contrary to the evidence, and the great preponderance thereof, and against the charge of the court thereupon, in that the evidence shows that no such fraud as that alleged by the defendants, existed to avoid the deed of trust, under which plaintiff claimed title, and that whatever fraud or suspicion thereof, if any, may have existed, the same was insufficient to avoid or affect the rightful ownership of said goods, and possession thereof by the plaintiff because it was shown that each and all of the creditors named in the deed of trust, were *bona fide* creditors of Freiberg, Klein & Company, at and before the making of the deed of trust; and before the said attachment and seizure, several of the said creditors, without any knowledge or suspicion, or any reason to inquire into any such fraud, as was alleged in avoidance of said deed of trust, accepted the provisions of the said deed of trust and the security thereby afforded them; and under the charge of the court in this regard, the said verdict ought have been in favor of the plaintiff.

3rd. The said verdict is unsupported by the evidence and contrary to the charge of the court, in that, no such fraud as that alleged by defendants for avoiding said deed of trust, was shown to exist, and under the charge of the court, in that regard, the verdict ought have been for the plaintiff.

4th. The said verdict is unsupported by the evidence, in this, that it was conclusively proven, and there was no evidence to the contrary, that before the attachment of the goods in controversy, several of the creditors named in and secured by the deed of trust accepted the same, and if any fraud in the making of said deed of trust was alleged and proven there was no evidence to show that any of the creditors named in said deed of trust who accepted the same, had at or before the time of such acceptance, any knowledge of such fraud, or reasonable cause to suppose the same existed.

5th. The said verdict is contrary to and unsupported by the evidence and against the law, as charged by the court, in that the court charged the jury, as matter of law, that if any creditor accepted the terms of the deed of trust before the levy of the attachment, and if the said creditor was not infected with fraud, as

133 defined by the charge of the court, the entire property in said deed of trust, passed to the plaintiff, and he should recover for whatever amount said property was worth at the time and place when taken; and that such creditor to be affected with fraud, if any in fact existed, must have either had actual knowledge of the fraudulent intent or the circumstances surrounding the transaction, and the evidence taken as a whole, must show and indicate that he knew of the fraudulent intent, or was possessed of information which

would put a reasonably prudent person upon inquiry, and that such inquiry if properly followed, would have led to the knowledge that the instrument was fraudulent. And the evidence shows in that regard, that Adoue & Lobit were *bona fida* creditors of said Freiberg, Klein & Company, were secured by said deed of trust, and accepted the terms thereof and benefit thereof, before the levy of the said attachment, and that their debt was not infected with fraud, and that they neither had any actual knowledge of the fraudulent intent, if any, with which said deed of trust was made by Freiberg, Klein & Company. Nor were there any circumstances surrounding the transaction, nor did the evidence taken as a whole or in any part, show or indicate that said Adoue & Lobit knew of the fraudulent intent, if any, on the part of Freiberg, Klein & Company, or were possessed of any information which would have put a reasonably prudent person upon inquiry, which if properly followed out, would have led to the knowledge that the instrument was fraudulent or executed with a fraudulent intent. And this is true not only of the said Adoue & Lobit, but also of A. W. Fry and S. A. Walker and the First National Bank of Galveston and the Citizens' Loan Company and the Island City savings bank.

7th. The court erred in admitting upon the trial, over the objection of this plaintiff, the evidence of the witness Gorse, with the statement that the same would be controlled in the charge of the jury, and in not striking out the same in the charge to the jury, or showing its true significance; and herein the jury was misled and confused, to the prejudice of plaintiff.

8th. The court erred in admitting direct interrogatories 9th to 70th inclusive, propounded by the defendants to the witness
134 Moses Freiberg and in admitting the answers thereto over the objections of the plaintiff, because such questions were designed to elicit and did elicit, and the answers thereto stated, matters that were irrelevant and incompetent to the issues in this cause, and related entirely to conversations and transactions between persons who were not parties to this cause, without having been in the presence or within the knowledge of the plaintiff or any of the beneficiaries named in the deed of trust.

And further, because said matters, transactions and conversations testified to by the witness in answer to said interrogatories, did not show or tend to show fraud in the particular transaction under consideration in this cause, and if they did show or tend to show a fraudulent intent in the making of said deed of trust, the beneficiaries in said deed of trust were in nowise shown to be nor were they connected therewith by knowledge or notice thereof at any time before their acceptance of the deed of trust under consideration in this cause.

And the court erred further in this respect, because at the time of overruling plaintiff's objection, the court stated that the evidence would be admitted and if found to be irrelevant and incompetent would be controlled in the charge, which the court wholly failed to do. And the court erred in failing to control the effect of said evidence in his charge, especially after having announced in the pres-

ence of the jury that if it was found to be irrelevant and incompetent, that he would so control it in his charge, and the failure to so mention the matter in his charge, misled the jury to plaintiff's prejudice.

9th. The court erred in admitting in evidence over the objection of plaintiff, the statements made by Freiberg, Klein & Co., to R. G. Dun & Co.'s agency, and the report of such agency to the defendant The Christian Moerlein Brewing Association, because said statements and reports did not in anywise show or tend to show fraud on the part of Freiberg, Klein & Co., in the making of the deed of trust in question in this case, but only showed, if anything, that they had obtained a credit and merchandise upon false representations of fact, which, if false as claimed by the defendants, would have entitled the creditors deceived by such statements and re-
135 ports to have rescinded the several contracts of sale made on the faith thereof.

The evidence was further irrelevant and incompetent, because it was not shown that the beneficiaries in the deed of trust had any knowledge of such false statements and reports of any notice thereof, or any reason to suspect the existence of the same at any time prior to their acceptance of the deed of trust aforesaid. And the court erred in failing to control the effect of said evidence in his charge, especially after having announced in the presence of the jury that if it was found to be irrelevant and incompetent that he would so control it in his charge and the failure to so mention the matters in his charge misled the jury to plaintiff's prejudice.

10th. The court erred in admitting direct interrogatories 4th to 10th propounded by the defendants to the witness E. H. Gorse, and the answers in regard thereto, over the objection of the plaintiff, for that said questions were directed to elicit and did elicit matters irrelevant and incompetent and relating to conversations and transactions among persons not parties to this suit, and which conversations and transactions were not within the presence of knowledge or notice of the plaintiff or of any of the beneficiaries named in said deed of trust, and the court erred further in failing to control the effect of such testimony in his charge after having stated in the presence of the jury that if it was found during the trial to be irrelevant, he would so control it in the charge, and the failure so to control it misled the jury to plaintiff's prejudice.

11th. The court erred in refusing to grant plaintiff's motion to strike out all the testimony of the witness Gorse, relative to rumors as testified to by him in his direct answer No. 8, because of his failure to answer cross-interrogatory 6th propound- to him by the plaintiff, in said answer to said cross-interrogatory the witness Gorse refused to disclose the sources of his information as to rumors affecting the credit and standing of Freiberg, Klein & Co. as testified to by him in his answer to direct interrogatory 8th. And this failure on the part of the witness to answer the said cross-interrogatory 6th precluded the plaintiff from contradicting the witness; and
136 this error of the court was all the more material and injurious to plaintiff, because there was absolutely no evidence that could by any possibility charge the beneficiaries in the deed of trust

with any notice constructive or actual of fraud on the part of Freiberg, Klein & Co. if any, save and except the vague and uncertain testimony of the said Gorse as to the prevalence of rumors in Galveston affecting the solvency of Freiberg, Klein & Co. during the fall of 1892.

12th. The court erred in refusing to give plaintiff's general instruction to find for the plaintiff, copy of which is hereto attached, because the uncontradicted evidence showed that at least one of the beneficiaries named in the deed of trust accepted the same before the levy of the attachment by the Christian Moerlein Brewing Association, without any knowledge of any fraud on the part of Freiberg, Klein & Co. and without knowledge of any facts that would have put him upon notice of such fraud if the same existed. The general charge of the court submitted the fact of acceptance and the fact of knowledge of fraud to the jury when there was no dispute about the same as to all of the beneficiaries who accepted and certainly as to Adoue & Lobit, S. A. Walker and A. W. Fly.

13th. The court erred in refusing the plaintiff's special charges 1, copy of which is hereto attached.

14th. The court erred in refusing plaintiff's special charge No. 2, copy of which is attached hereto.

15th. The court erred in refusing plaintiff's special charge No. 3, copy of which is hereto attached.

16th. The court erred in refusing plaintiff's special charge No. 4, a copy of which is hereto attached.

17th. The court erred in refusing plaintiff's special charge No. 5, copy of which is hereto attached.

18th. The court erred in refusing plaintiff's special charge No. 6, copy of which is hereto attached.

19th. The court erred in refusing plaintiff's special charge No. 7, copy of which is hereto attached.

20th. The court erred in refusing plaintiff's special charge No. 8, copy of which is hereto attached.

21st. The court erred in refusing plaintiff's special charge No. 9, copy of which is hereto attached.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Attorneys for Plaintiff.*

137 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL
*vs.*
MOERLEIN BREWING CO. *et als.*

Plaintiff asks the court to charge the jury as follows, viz:

The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been at the time of its execution, the *bona fide* debts of the makers Freiberg, Klein & Co. It has been further shown, that some of the creditors named

therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against said Freiburg, Klein & C-., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff who was at the time lawfully in possession of them under said deed and converted them to the use of said brewing company. You are therefore instructed to find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of six per cent. per annum from the date of such seizure to the date of your verdict.

Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of seizure.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Plaintiff.*

138 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL
*vs.*
MOERLEIN BREWING CO. *et al.*

Should the court refuse to give the general instruction asked in favor of plaintiff, then, and only in that event, the plaintiff asks the court to charge the jury as follows:

1.

If the plaintiff in this suit is entitled to recover against the defendants he is entitled to recover the market value of the property taken from him by the defendants under the writ of attachment levied on Dec. 23, 1892, together with interest from that date at the rate of six per cent. per annum.

The market value of the property above referred to is not the value of the property in a distant market or markets plus the cost of transportation to Galveston. Neither is it what the property brought at the auction sales by the marshal. By it is meant the reasonable market selling value at wholesale of the said property at the time and place of the seizure under the attachment.

2.

If you believe that said deed of trust was made for the sole purpose and with the sole intent to secure or pay the debts recited therein, and that one or more of the recited creditors accepted the same before the levy of the attachment, you will find for the plaintiff.

3.

Again, if you believe that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay or defraud their creditors, but that one or more of the beneficiaries named therein accepted the deed of trust before the levy of the attachment without notice of such intent you will find for the plaintiff.

139 4.

On the question of alleged fraudulent intent on the part of Freiberg, Klein & Co., I instruct you that although insolvent, they had a right to prefer certain favored creditors over others less favored, and that if their purpose was simply to secure or pay the favored creditors their deed of trust would not be fraudulent or invalid merely because it postponed or even defeated the claims of their creditors who were not preferred.

5.

On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts as would have caused a reasonably prudent man to have inquired into such intent and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them on inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent then they would not be chargeable with notice of such intent, unless they had knowledge of it.

6.

On the question of acceptance I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word accept in accepting the deed of trust. A creditor who communicated to the trustee or to Freiberg, Klein & Co., his willingness to accept the security and benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City savings bank, the Citizens' Loan Company
140 and the First National bank, and he had authority from them either express or implied to do so, the said corporations ac-

cepted. In considering his authority, you will consider the offices he held, his previous conduct of said offices and the sanction if any accorded by the said corporations to his acts of similar nature and to his acceptance, if any, in this matter.

7.

The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument.

The fact that a debt secured by a deed of trust is also secured by personal endorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as an endorser upon his claim when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed, and his acceptance thereof. The fact that Fellman or Fellman & Grumbach may have been guilty of fraud does not affect your verdict, if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's endorsement.

8.

The fact that Fellman or Fellman & Grumbach may have, subsequent to the attachment paid off some of the claims secured
141 by their endorsement must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account of the claims they have paid, that is a matter that cannot be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose.

9.

I have necessarily admitted evidence, which, at the time it was offered I could not foresee the relevancy of. Such for example as the testimony relating to Seinsheimer's misconduct towards his partners and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy

had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff.

10.

If you believe that before the levy of the attachment any one creditor named in the deed of trust accepted it without notice of the alleged frauds charged against other parties you will find for the plaintiff the reasonable wholesale market value of the entire property attached with interest at the rate of 6 per cent. per annum from Dec. 23, 1892.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Plaintiff.*

Indorsements: "1702. C. L. J. Sonnentheil *vs.* Christian Moerlein Brewing Co., *et al.* Plaintiff's motion for new trial. Filed Nov. 14, 1895. C. Dart, clerk, by W. L. Hanscom, deputy."

142 *Order Overruling Motion for New Trial.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 14th, 1895.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. *et al.* } C. L., No. 1702.

NOV. 14TH, 1895.

On this day again came the parties to this suit by their attorneys, and thereupon came on to be heard the motion of the plaintiff for a new trial in this case; and the court having heard the said motion, and duly considered the same, and the court being sufficiently advised, it is ordered that the said motion be overruled.

To which ruling and order of the court the plaintiff then and there in open court excepted, and prayed that his said exception be noted upon the record, which is according- done.

*Application of Pl'ff to Enlarge Time for Filing Bills of Exception.*

Filed November 14, 1895.

In the Circuit Court of the United States for the Eastern District of Texas.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON *et al.* } No. 1702.

In this cause comes the plaintiff now after the overruling by the court of his motion for new trial, and respectfully shows that the

court is now upon the point of adjournment for the term and that it is impossible before such adjournment to prepare and present and have allowed proper bills of exception for presentation of this cause upon writ of error to the circuit court of appeals, to which it
143 is the purpose and privilege of this plaintiff to carry this cause for review.

He prays therefore that an order may be made in this cause granting and allowing a period of sixty days from and after the adjournment of this term of the court, within which the parties may prepare, present and have allowed such bills of exception and that when the same shall have been so prepared, presented and allowed, they shall be filed in the cause as of this date.

SCOTT, LEVI & SMITH,
WILLIE, CAMPBELL & BALLINGER,
*For Plaintiff.*

It is agreed that the foregoing application may be granted.

HUME & KLEBERG,
*Of Counsel for Defendants.*

Granted.

D. E. BRYANT, *Judge.*

Indorsements: "C. L. 1702. Jacob Sonnentheil *v.* The Christian Moerlein Brewing Co. *et al.* Application of pl'ff to enlarge time for filing bills of exception. Filed Nov. 14th, 1895. C. Dart, clerk."

*Order Enlarging Time for Filing Bills of Exception.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

From the minutes of said court, October term, November 14th, 1895.

JACOB SONNENTHEIL *vs.* J. J. DICKERSON *et al.* } C. L., No. 1702.

In this cause on application of the plaintiff filed among the papers of the cause and agreed to in writing by the defendants through their counsel, it is ordered that a period of sixty days from and after the adjournment of this term of the court be, and
144 the same is hereby allowed and granted within which the parties may prepare, present and have allowed such bills of exception as they or either of them may desire for the purpose of carrying this cause to the circuit court of appeals for review and that when such bills of exception shall have been so prepared, presented and allowed they shall be filed in the cause as of this date.

*Plaintiff's Bills of Exceptions.*

Filed January 9th, 1896, as of November 14, 1895.

In the Circuit — of the United States for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL
*vs.*
J. J. DICKERSON *et al.* } No. 1702.

Be it remembered that on the trial of the above entitled and numbered cause had in and by the above-named court at its October term, 1895, the following among other proceedings were had and taken:

Plaintiff opening his evidence, read in evidence the following papers from the files and records of cause No. 1693 in the U. S. circuit court, eastern district of Texas, at Galveston, entitled The Christian Moerlein Brewing Company *vs.* Freiberg, Klein & Co.

1st. Petition of the plaintiff, The Christian Moerlein Brewing Company against Mose Freiberg, Joseph Seinsheimer and Samuel Klein, composing the firm of Freiberg, Klein & Co., defendants, to recover the sum of $28,386.22, alleged to be due said plaintiff by said defendants upon notes and open accounts specified in said petition. Said petition was filed December 23rd, 1892.

2nd. The attachment bond of said plaintiff as principal and J. P. Alvey, A. J. Walker and Texas Guaranty & Trust Co., as sureties, in the sum of $60,000 payable to the said Freiberg, Klein and Seinsheimer, conditioned that said Christian Moerlein Brewing Company, plaintiff in attachment against said Freiberg and Seinsheimer and Klein, composing the firm of Freiberg, Klein & Co., defendants, would prosecute its said suit to effect and that it would pay
145 all such damages and costs as should be adjudged against it for wrongfully suing out such attachment. Bond dated December 23, 1892, and filed and approved in said cause No. 1693 on December 23, 1892.

2d. Writ of attachment issued in said cause No. 1693 to the marshal of the eastern district of Texas commanding him to attach so much of the property of said Freiberg and Seinsheimer and Klein, composing said firm of Freiburg, Klein & Co., repleviable on security as should be of value sufficient to make the sum of $28,386.22, and the probable costs of suit to satisfy the demands of the Christian Moerlein Brewing Company and that he keep and secure in his hands the property so attached unless replevied that same might be liable to further proceedings thereon, to be had before said court at Galveston, in the county of Galveston, State and eastern district of Texas, on February 20th, 1892. Said writ was dated and issued December 23, 1892.

Also the returns of the marshal of the eastern district, J. J. Dickerson, by John M. Whalen his deputy, made upon said writ as fol-

lows: "Received this writ on December 23, 1892, and I executed the same December 23, 1892, by attaching the stock of goods in the store of Freiberg, Klein & Co. in the city of Galveston, Texas, in my district, the same being pointed out to me by L. Werner as the property of said firm. L. Werner being the agent of the Christian Moerlein Brewing Company and have the same now in my possession and inventory of same is hereto annexed. Signed J. J. Dickerson, U. S. marshal, eastern district of Texas, by John M. Whalen, deputy." Also, the said inventory mentioned and annexed to said marshal's return as a part thereof consisting of and comprising the same items of property as those specified in the plaintiff's petition in this cause No. 1702. The sum of the valuations of the marshal set opposite said items in said return aggregated $45,855.45.

Said writ was returned into court and filed January 19th, 1893.

4th. An application to the judge of said court on the part of The Christian Moerlein Brewing Company, plaintiff in said cause
146 No. 1693 for the sale of said property as being perishable and likely to deteriorate in value and be wasted during the pendency of said suit

5th. An order upon said application made by the judge of said court, January 21st, 1893, granting the same and directing the marshal to sell such property as under execution after advertisement as specified in said order.

6th. An order of sale issued out of said court to said marshal commanding him to sell said property as under execution after advertisement as directed by the judge in his order on said application.

7th. The return of the marshal on said order of sale showing that he had sold the stock of goods, wares and merchandise attached, as heretofore stated, for the sum of $51,258.16.

It was admitted that the proceeds of said sale were turned into court by the said marshal and held in the registry of the court to abide the judgment in said cause No. 1693, and other attachment suits.

8th. Judgment in said cause No. 1693, Oct. 25th, 1893, in favor of the plaintiff against the defendants for the sum of $29,623.48 and costs—and establishing and foreclosing the attachment lien on said property attached and the proceeds thereof, to secure the payment and satisfaction of the amount of said judgment and costs. It was further admitted that the said judgment and costs, amounting in the aggregate to $33,280.60 were paid and satisfied out of said funds, proceeds of the property attached and sold.

Witness THEODORE HIMLER, called for plaintiff, testified:

I live and have lived a long time in Galveston. For about 17½ years before their failure I was employed by Freiberg, Klein & Co. as rectifier in their mercantile establishment in Galveston. Immediately after their failure I was employed by Mr. Sonnentheil, the plaintiff in this case, in the same capacity in and about the same stock of goods as were held by Freiberg, Klein & Co., rectifying and assisting in other work in the store. Sonnentheil was in possession of the store and of the merchandise consisting of liquors, cigars and

wines, &c., which previously belonged to Freiburg, Klein & Co., and which was their stock which they turned over to Sonnentheil when they failed. I was familiar with the merchandise
147 which Sonnentheil had in his possession and with their values. Remained with him until the goods were taken away by the United States marshal. The marshal took away the contents of the store. Mr. John N. Whalen was the deputy marshal who did it. He took them away from Mr. Sonnentheil's possession. After that I did not remain with Sonnentheil. When the marshal seized the stock an inventory was taken by Mr. Whalen the deputy marshal and Mr. Duebner a clerk. I also took an inventory of the same goods, that is I checked up everything that went out as taken by the marshal.

(Referring to Exhibit A to the plaintiff's petition witness said:) I recognize this. It is an inventory of the stock that was taken out by the deputy marshal. I never examined this except at the last trial in the other court. My own memorandum of the stock was in a book. This Exhibit A is in the handwriting of Mose Freiberg, a mimeograph copy. I am familiar with the values set opposite these goods composing the stock taken from Sonnentheil by the marshal. I find the values from sales made by our drummers what they cost, and what they sold for. Orders were received from drummers in the country and copies of them made in the office. These copies were given to me with the prices set opposite the articles sold, and according to those prices I filled the orders with the good-. I have looked over this exhibit and examined the prices in a general way. It would take me a long time to go over all of them, but those were the market values of the goods at that time. The prices at which the goods were sold at the time. I mean by wholesale in Galveston in the store of Freiberg, Klein & Co. Mr. Freiberg put the prices opposite the goods, that is his writing, I did not assist in that.

Cross-examination by defendants:

These are the wholesale prices and values of the goods in Galveston at that time. (There are 15 pages to the exhibit and about 36 items on each page.) I made a list of the goods for Mr. Seinsheimer, checked them out with the marshal who made another one for himself. I never attached any prices to the goods in
148 my inventory, nor agreed what the goods should go at. I have not looked at every item on these 16 pages, nor at half of them. I was interrogated by deposition with reference to the values of these goods and examined the list then with a view to testifying by deposition. This list I never examined except at the former trial and never at the request of Mr. Sonnentheil or otherwise outside of the court-house examined at any time this exhibit and the prices. I also saw it when I gave a deposition before notary public about a month ago. I looked over the list at that time and the prices. I am competent to tell the market values and prices of those goods at Galveston at the date of the seizure. They are accurately represented in this exhibit. I feel authorized in saying that;

I cannot without looking at the inventory call off any half a dozen items or the prices. I did not commit it to memory. I can take the inventory and look at the items and tell you the prices. I was a rectifier and was employed in that capacity by Freiberg, Klein & Co. Used to sell goods; anybody that would come in to buy a barrel of whisky or less or more I would sell it. I had that privilege, to sell goods, but I was kept for my occupation as a rectifier. I never bought any goods for them. In my deposition I testified that I was not a buyer or seller of goods for Freiberg, Klein & Co., or for Mr. Sonnentheil. My statement as to values and prices is as to the selling prices in Galveston at that time. I was pretty familiar with the character of the trade and business of Freiberg, Klein & Co. They traded in the city and the country, largely in the country. Business was done largely on orders from country customers, and by the drummers of Freiberg, Klein & Co. I would get orders from the office downstairs with the prices attached and copy them in the book and fill the orders. I did not bother myself about the time the bills were payable or whether they were for cash. The book-keeper attended to that. I attended to the prices, got out the goods according to the prices. The prices were on the orders. I simply had to fill them. The orders were sent in by the drummers from the country, I suppose. They put the prices on them. I do not know whether the purchasers paid for the goods at all or not. Knew nothing of that.
149 Did not bother myself about it. If 100 or 10 barrels of whiskey were ordered, I would simply get directions from the office and prepare that much for shipment. I knew the prices, but about the terms I knew nothing. Some were for cash some thirty days, some sixty and some ninety days. That I could see on the orders. Suppose the prices were fixed on the cost at this place with the profit. They were not doing business for fun. The prices that I speak of as being correct are what I suppose were fixed with reference to the original cost, cost of transportation to Galveston added, and the profit. I did not worry about the amount of the profits, and don't know to what extent they went into the figures. Don't know what distinction was made between a cash customer or a credit customer. Suppose the cash customer got a discount in that way would get them cheaper than the other man. Sales were made in parcels that is ten barrels of whiskey to one man, ten to another and so on. My prices were about the average selling values of the goods. Never sold the whole stock except to the United States marshal. Don't think stock should sell for as much in bulk as in parcels, Freiberg, Klein & Co. had in their employ before their failure, Mr. Grelling, their book-keeper, Mr. Lucas stenographer, Mr. Covert, collector, Tony was my assistant and porter. I was there, Seinsheimer was there, manager of the office and cashier. Freiberg was in town sometimes, sometimes on the road. His business was that of salesman. Klein was generally on the road in the same capacity. Meriwether was the shipping clerk.

On the day following the deed of trust, I came down in the morning and went upstairs as usual to go to work, went to get my orders,

and Seinsheimer told me he was not my boss any more, and that Sonnentheil was the trustee for the business, I would have to see him about going to work. He, Seinsheimer, had nothing more to do with the firm. I was surprised and waited there until nine or ten o'clock when Mr. Sonnentheil engaged me. I think Seinsheimer was engaged there too. Freiberg was there that morning. He was not habitually there. He was in town that week. Seinsheimer was in the office, Grelling stayed there, all of us stayed there.
150 Business went on just as before under the same employees, run by Mr. Sonnentheil as trustee with the same employees. Seinsheimer was cashier. No new man employed that I know of, all of our shipping tags went out "J. Sonnentheil, trustee." Before Sonnentheil went in there was a sign of Freiberg, Klein & Co. up before the store. The same sign remained there. Nothing was put up about Sonnentheil, trustee, outside on that sign. The same people were at work, except Sonnentheil was there claiming to be trustee. The bills of lading and shipping tags were changed. The business went on as before. I sold goods, same men sold. Seinsheimer collected the cash and Grelling was book-keeper and so continued. While Sonnentheil was there some goods were sold in the usual course before the attachment by the marshal. No goods were received. I do not remember how much was sold by Sonnentheil. When I first went there at Sonnentheil's request I made an inventory of the stock. It was made differently. I made it on a large book. This one was made on a small memorandum book with the assistance of Tony I got up the items of the inventory made for Sonnentheil at the time he took charge and gave it to Sonnentheil. I did not put any prices on that inventory any more than on the last one. I think it was done Friday. I do not remember the date, otherwise. Did not know how Sonnentheil came there until that morning, when Seinsheimer, told me he made an assignment to Sonnentheil as trustee and I should see him before going to work. Sonnentheil told me he was trustee and if I wished to remain there at the same price I could remain, at the same price. No figures were named. I suppose he knew what my salary was. He found it out the next day. I do not know what prices were affixed to the first inventory I made out for Sonnentheil. Did not see it after it was made out. I checked off the goods and put them down in my book. It took us nearly all day to make it. I believe it was all day and part of Sunday. That is, we may have begun on Friday and worked Friday, Saturday and a part of Sunday. We sold some of these goods before the attachment by the marshal and received none, therefore the goods seized by the marshal were less than those taken charge of by Sonnentheil. I did not remain
151 with Sonnentheil after the stock was taken away by the marshal. He paid me up for the time I was with him. We received no goods while Sonnentheil was in charge. Know nothing of the arrangements made with other employees nor of their duties. Only what Tony told me. Since my examination commenced here in court and during a recess of the court, I have gone over this inventory of the stock attached. (Referring to Exhibit A

to plaintiff's petition.) The first item is 37 barrels R. Monarch whiskey value $2.25. That was the selling value of that whiskey. Turning a page and taking an item along in the middle of the page there is a barrel of peach brandy. Walters' Maryland peach brandy, 2.50, that is about the average selling price at that time. A barrel of 101 corn proof whiskey $1.60. I examined the inventory in this way during the recess and the prices here indicated are those that I recollect to have been the selling prices of the goods at Galveston at the time that they were seized and their market value.

Re-examination by plaintiff:

I am able to say that these prices are correct selling prices, because I know the goods. I handled such goods for seventeen years and got my information from the selling prices in the orders. Monarch whiskey and other liquors increase in value with their age. The 33 barrels Monarch whiskey mentioned here was the newest goods they had in stock and we sold the goods at that price. We never handled 33 barrels of old goods. That was the spring of 1890 goods, the cheapest quality of Monarch. I took the inventory of the stock and when I look at that thing I remember everything just as if it happened today. (Asked by counsel for defendant.) "There is some Keller whiskey, a good deal on this inventory, what was that worth, do you recollect?" A. It was worth, we were selling it at $1.60 to $1.75, that was redistilled goods. There were cigars on the list I got out those orders too. I got my knowledge of the value of cigars from the orders also. My means of knowing was my experience with the transactions of the house. With the exception of cigars we had a selling price list for them adopted
152 by the office. I never had anything particularly to do with the bills or invoices. Freiberg, Klein & Co. sold goods to anybody for what they could get, just like any other business house. The inventory there Exhibit "A" to plaintiff's petition has about the average selling prices. I never billed out the goods, but prepared them for shipment on the office orders at the price indicated. If a man bought ten barrels whiskey, he would get a different price, a few cents per gallon cheaper than the man who bought a small quantity but this Exhibit "A" was about the average selling price.

Plaintiff SONNENTHEIL testified in his own behalf:

I am familiar with the issue involved in the suit. This Exhibit A to my petition in this cause is an invoice of the goods taken away by the deputy U. S. marshal from my possession on December 23, that is, beginning with December 23, 1892, I had them in my possession at the time in the store formerly occupied by Freiberg, Klein & Co., on Strand and Bath avenue in Galveston, Texas, in the city of Galveston, county of Galveston, State of Texas. I owned it in trust, I was not the absolute owner. Deputy Marshal John N. Whalen seized the goods, J. J. Dickerson was the marshal. The seizure was made without my consent and over my protest. No

part of the property seized was returned to me after being taken by the marshal, nor have I been paid by the marshal or any one else the value of said property or any part thereof. The market value of the property so taken was the amount of this Exhibit A to my petition, $84,273.05.

Cross-examination:

The business of my life has been principally in dry goods. Later I manufactured vinegar and salt, and cigars, and later on was a broker. Have lived in Galveston thirty years, am 54 years old, was 24 years old when I came here. I was connected with the firm of J. Sonnentheil & Co., beginning in 1865. That was my first business here. This was merged into another firm, Sonnentheil Bros. & Co. and Sonnentheil Bros. & Wenk. That was in 1867. They dissolved about 1872 or 1873. I don't remember ex-
153 actly. I think it was from 1867 to 1874. Their business was dry goods, boots and shoes. Then Sonnentheil Bros. continued in the dry-goods business. It was a continuation of the old business by my brother and myself. We only carried dry goods. This lasted until 1876 or '77, and then the business was changed to Sonnentheil & Lyon. The character of the business remained the same. Sonnentheil & Lyon'- business continued until March 1883 when we sold it out and formed a partnership with the then existing firm of Greenleaf, Block & Co. We sold out Sonnentheil & Lyon's stock at retail as far as possible and then sold the remnant to Nordholtz and went in with Greenleaf, Block & Co. Their business was wholesale dry goods, boots and shoes, notions, and hats, on the Strand, and the new firm, when Lyons and I went into it, was Block, Oppenheimer & Co. My brother had gone out of the firm of Sonnentheil & Lyons in 1882, a year before Lyons and I went into Block, Oppenheimer & Co. Block, Oppenheimer & Co. were successors of Greenleaf, Block & Co. They continued business until 1887 when they failed. I was a member of the firm at that time. Since then I have manufactured vinegar and jobbed cigars in connection with vinegar and other kindred articles, sauces, pickles, etc. Block, Oppenheimer & Co. made a settlement, but never resumed business. Cannot tell the figures at which they settled exactly, because they settled at various figures. I think it cost 65 or 70c. on the dollar all around as an average. Gust Feist was associated with me in the manufacturing and jobbing business after Block, Oppenheimer & Co. failed. I was known as a partner in the manufacturing business. I sold out the vinegar business after about four months to my partner, Mr. Feist. It was a profitable business. I made nothing out of it myself. It was profitable, but I did not enjoy the profits. In order to turn it over to my partner I proposed to let him have all the profits during the time we were together and to take out all I put in. Since then I have been engaged in real estate, buying and selling of real estate, handling money, loaning and borrowing money. This continued up to the time of the failure of Freiberg, Klein & Co. I quit the vinegar business in 1890 or

'91. Never in my life before had anything to do with the
154 liquor business. Had no familiarity with that business, nor knowledge of it, nor the value of goods in that line. I did not fix the values that are put down in Exhibit A to my petition. They were fixed by Mr. Freiberg and Mr. Seinsheimer. My statement of the values is based on their valuation. The items of cigars, however, I satisfied myself about by looking over their list, the list which they had in their office. The whiskey and wines and other matters I could not learn about except from what they told me. The Exhibit A to my petition was made out under my direction. With reference to litigation about the values of those goods and my remembrance of such values as trustee, against the marshal and the Christian Moerlein Brewing Company, after their seizure, the prices were not regulated by my purpose to claim same in the suit. If I have ever stated otherwise in a deposition it was because I misapprehended the question. It is not a fact no matter whether I said so or not.

(Handed his written deposition taken in the cause, witness stated) I have no objection to reading the cross-interrogatory 8 and my answer out loud. Question is "Is it true that you had such an inventory as shown by said exhibit prepared after the inventory by the marshal and in view of litigation with respect thereto and was it one of your purposes in having said inventory made to claim and establish in such litigation the values by said inventory ascribed to the goods seized. Be specific and full in your answer and declare all the facts." The answer is "Said inventory as shown by said exhibit was prepared after the seizure by the marshal. It was made in view of litigation with respect thereto, and it was one of my purposes in having said inventory made to claim and establish in such litigation the values in said inventory ascribed to the goods seized." That is true. I had charge of the goods seven days before the seizure, from December 16 to December 23rd, 1892. I had charge by virtue of the deed of trust which transferred the property to me. That is filed in the office of the county clerk of Galveston county. The marshal seized the goods under a writ of attachment issued out of this court against Freiberg, Klein & Co. at the suit of the
155 Christian Moerlein Brewing Company. That was while I was in possession as trustee. I protested against it. I had an inventory made when I first went in there, made by Himler at my request. He made a list of the goods. I think Freiberg and Seinsheimer priced the goods in that inventory. I went into possession Friday night. I think I had it made on the Monday morning following. Cannot be positive about it. Himler listed the goods, put no prices on them. That was done by Seinsheimer and Freiberg as well as I recollect. I sold goods from December 16th to December 23rd amounting to $2,182.57. I received no fresh goods after taking possession. The goods were fewer in amount and less in value at the date of the seizure than they were at the date when we went in, by more than the amount that I sold. There were some goods sequestered taken out on writs of sequestration. I don't remember the amount. It was whiskey. All the goods which I took

charge of under the deed of trust, except some $2,000 and odd dollars worth sold as above stated, and except also the goods sequestered, were in the store when the marshal levied the writ of attachment and were seized by him under said writ. M. V. Monarch Kentucky whiskey men sequestered some of the goods, and R. Monarch, or the Monarch Distilling Company, sequestered others. The inventory taken when I went into possession was not taken at the market values of the goods. The amount of the first inventory taken of the goods when I took charge of them was $68,773.54, exclusive of beer. There was beer in the second inventory seized by the marshal. The value set down in the first inventory was $68,773.54, exclusive of beer, which amounted to $1,627.50 more. The aggregate of these amounts was about $70,000 in round figures —a little more than that. The stock was worth that when I first took the inventory. The second inventory amounted to about $84,000. The difference between the two in round figure- is about $14,000. If the two inventories had been made upon the same basis of value the second would have been less than the first. The second inventory contained matter which the first did not contain—rolling stock, mules and fixtures, &c., that was not included in the first inventory. There were 95 barrels whiskey sequestered
156 which I replevied and sold for $5,353.22. The object of making the first inventory was to see what the assets consisted of as far as the goods were concerned. In my depositions taken in the State court here produced before me, cross-interrogatory 9 is as follows: "Did you have an earlier account of stock or inventory taken than the one reflected by said Exhibit A immediately after you became trustee? If you did, who took that account or inventory? On what date or between what dates was it taken? For what purpose was it taken without prices? Were the prices on the stock affixed to the articles of goods in that inventory, and if so, were they the same prices subsequently affixed to the sale of like articles in said Exhibit A," and my answer is, "I did have an earlier account of the stock taken immediately after I became trustee. Mr. Himler made a list of the property which was taken on my assumption on the trust on December 17th, 1892, for the purpose of fulfilling what I considered my duty as trustee. The prices of goods were affixed to the articles in that inventory. They were not the same prices subsequently affixed to the same or like articles in said Exhibit A." Said answer is correct. My reasons for having the first inventory made were that a lot of property was turned over to me without prices, without telling me specifically what it was, and I wanted to know exactly what it was. I did not have it then in my mind that it might serve me in case I was held accountable. Values were put in because I was directed in the deed of trust to sell the goods, and in order to sell them I had to know what they cost so that I would not sacrifice them. My intention was not to sacrifice the goods as trustee, but to get their full value for them. I was giving the trust credit for the full value of the goods in the first inventory according to my understanding, tried to do it. This inventory was intended to apprise me of the cost of the

goods, and I intended to make out of the goods, as I said before, all I possibly could in selling them, and I expected to get an advance over the cost price of the goods. For that reason I affixed a higher value in the second inventory, said Exhibit A, such a price as I thought I would have got for the goods had I not been disturbed in my possession. The additional value was what would be derived from the sale of
157 the goods and not from their then value. The first inventory did not reflect what I honestly thought was their real value. If I said anything otherwise I did not express myself as clearly as I intended to. I meant to say I put the cost price there in the first inventory. I did not put down any prices at all. Seinsheimer and Freiberg put down the cost prices. I do not know whether the goods were worth more or less than the cost prices I put down. I consider it a fair statement of what goods were there and what they paid for them and what they were invoiced to them for. I put down no values. I authorized the cost prices to be put down, directed others to put down the figures in both instances. Knew nothing of it myself. I put down the cost prices in the first instance or had it put down. In the second instance I had the selling prices at that time put down. The cost price at first would have been less than the aggregate for a lesser quantity of goods charged out at selling prices in the second inventory. The less quantity of goods might be more valuable at selling price than a larger quantity at cost price. As a matter of fact the original stock of goods diminished by about $8,000 taken out in various ways, as above indicated, amounted on the second inventory to something more than $14,000, more than the whole stock did on the first inventory. Had the goods been lost by my fault I cannot say to what extent I would have considered myself liable to those who made this trust deed or what my liability would have been; had such a demand been made upon me under those circumstances I suppose I would have submitted the demand to my attorneys to see if it was correct. The first inventory was put down at the cost prices. The second was at the wholesale selling prices that is parcelling the stock out. Cost price referred to as taken in the first inventory I think was the invoice price and freight added to Galveston. I did not personally examine the invoices indicating the cost prices of the goods when the first inventory was made. That was entrusted to others. In respect of Exhibit A I verified the prices of cigars from the list they had in the office there, the selling prices. I helped to make the extension on those sheets and in doing that I called out the cigars myself, that is, some of
158 them. I say the other inventory was made with respect to cost of carriage because Seinsheimer and Freiberg were instructed to make them out that way. I had no personal knowledge of it. I have a suit in Illinois to recover a rebate on this whiskey, claiming a little more than $2,000. I do not know that this is a proper item to deduct from the value of these goods. I am not acquainted with the whiskey business, nor how it is carried on. I do not know the nature of this rebate, nor what it is given for. I am

suing for it. It was part of the property of Freiberg, Klein & Co. when I went to the store of Freiberg, Klein & Co. to take charge of it. Seinsheimer was there with Mr. Meriwether, no one else. This was at night after business hours, after 8 o'clock, Friday, December 16. They gave me the keys with the deed of trust. Seinsheimer was one of the partners. Meriwether was an employee of the house, collector, I think. He did that sort of work for me. Next morning Seinsheimer, Lucas, Paul Lossow and Himler and Tony and Grelling were in the house. Mr. Covert was not there, he came in the evening, I think. I think Klein was in Dallas at that time. I am not sure. In my depositions question 17 is as follows: "Name every person whom you found connected as a worker, whether partner or employee in the house of Freiberg, Klein & Co. at the time you went there as trustee, and the nature of the service that each had been doing. Name every person retained by you in the business and the capacity in which he served, and the date at which your employment of him ceased," to which interrogatory I answered "Upon assuming the trusteeship I found connected in the house of Freiberg, Klein & Co. the following parties—M. Freiberg, J. Seinsheimer, Lucas, Grelling, Meriwether, Himler, Lossow, Covert and Tony. Klein was at that time representing the business for the firm in the northern part of the State. Huff and Gravenberg were in the country employed as drummers for the house. Freiberg, Seinsheimer and Grelling were partners and others were employees, the nature of whose services will appear in the second part of this answer. I retained in the business the following parties, Mr. Freiberg, to attend to sales and collections in Houston and southwest Texas. His employment ceased on the 15th
159 of March, 1893. Mr. J. Seinsheimer as book-keeper and general assistant in the office. His employment ceased on the 15th of May, 1893. Mr. Klein was employed in selling goods and collecting outstandings in north Texas, was acting for the firm and selling goods and collecting outstandings in northern Texas, and I retained him for that service. His employment ceased on the 15th of March, 1893. Lucas I retained as stenographer and typewriter. His employment ceased on the 20th of February, 1892. I employed Mr. Grelling as book-keeper and his employment ceased a few days after my assumption of the trust. Mr. Meriwether served in the capacity of city collector, and I retained him until February 15, 1893. Mr. Himler was rectifier and I retained him until December 31, 1892. Lossow was the office boy and I retained him until April 15, 1893. Covert was the manager of the beer department and his employment ceased on the day of the seizure by the marshal. Tony was the porter and his employment ceased on the 12th day of February, 1893. Huff and Gravenberg were drummers and were called in by me and discharged on the seizure by the marshal." That is correct. Not any man I found there was discharged until the seizure. They were retained and discharged as that answer shows. On the 17th I think I spoke to every one of them, on the 17th, except those absent from the city and retained them in the service up to the time the marshal seized; everything kept on as it had been. I suppose

before the failure they must have been buying some goods and borrowing some money. I borrowed no money nor did I buy any goods. The business was carried on by the same agency as before I took charge. No change in the outside appearance of the house that I know of, no sign taken down nor any thing showing I was there as trustee. I had nothing done in that direction. I retained the employees on the same pay as I found them, told them I did not know how long I would have use for them and they must not consider themselves permanently engaged. They could stay as long as I had use for them. If I ceased to have employment for them I would discharge them and they must not expect to stay any length of time. Seinsheimer was in the office in charge as
160 book-keeper, in charge of the books. He was not in charge of the cash. He was in charge of the daily small receipts of cash that came in, not including the checks that came in, small money that came in. He had charge of. The principal cash was kept by me. In such a business very little real cash is handled. It is generally done by checks. So far as money came into the house for goods during the day sold around town he had charge of it, for the day, until time for deposit came. He had the key to the place where the money was kept until I got it out in the afternoon when deposit was made. I paid him $300 a month to March 15th, and $150 from March 15th to May 15th, 1893, when he was discharged. Freiberg I paid $300 a month to March 15th, 1893 when he discharged him and Klein $300 a month to March 15th when he was discharged. I do not know what they got before I went there, never looked to find out. I think that Freiberg, Klein & Co. were insolvent December 6th, 1892. I know it, from the fact that they made a deed of trust to me. I did not know it before, but knew it that day. That is, I knew it on the Monday before. In my testimony taken by deposition occurs the following question "Did you testify on the former trial of the case in the Galveston district court in Sonnentheil *vs.* The Texas Guarantee and Trust Company? Whether you did so testify or not, is it true that the debt purported to be secured by the trust deed amounted to about $140,000 and that the assets received by you, country account $72,000, city accounts $20,630.17, bills payable $21,112.32, stock in store or warehouse $66,773.54, beer on hand $1,627.50, store fixtures, $519, office fixtures $580, live and rolling stock $1,680, refrigerator and faucets $853, unearned insurance $373.10, beer account $2,190.75, judgment and other claims and accounts $99,189.49, said to be a profit and loss business, upon which you could not fix a value, equity in collaterals in the Island City savings bank of more than $5,000, equity with Sam. Seinsheimer $2,800, equity with the American National bank, collected same $360, equity in two Dallas saloons arising out of trust deed to Kempner, to an extent not stated, and the assets received by you so far as shown by the books $317,036.60." My answer to that question was and it
161 is now that the debts purported to be secured by the trust deed amounted to $140,000, the assets received by me were country account $72,900.27, city accounts $20,630.71, bills receivable

$21,112.32, stock in store and warehouse $68,773.54, beer on hand $1,627.50, store fixtures $519, office fixtures $580, live and rolling stock $1,658, refrigerator and faucet $853, unearned insurance $372.10, beer account $2,190.75, judgments and other claims and accounts $99,189.49, equity in collaterals in the Island City savings bank about $5,000, equity with Samuel Seinsheimer $2,800, equity with the American National bank, collected same $350, equity in two Dallas saloons to an extent then not stated, and the aggregate of the assets then received by me and shown by my books was $317,036.60. To all of these facts I testified on the former trial. The aggregate amount $317,036.60 is correct with the exception of 60c. clerical error. The following are the debts secured by the deed of trust which were paid by me in full, B. Kahn, July 5, 1893, $1,498.60 and interest $46.87, total $1,645.47, A. W. Fly, administrator Jan. 7, '93 $3,913.91, Island City savings bank Jan. 12, '93 $5,000 and interest $6.67, total $5,006.67, Jan. 12, $5,000 less discount $45.38 making $4,954.47, Jan. 12, $5,000 less $61.67 making $4,938.33 Jan. 20, $5,000 less discount $70.00 making $4,930, Jan. 30, $5,900, less discount making $5,434.02 February 20, $4,000 less discount $7.33 making $3,992.67. These all were paid in full. The following were paid in part First National bank, April 27, '93, $3,500, May 8, '93 $1,500, and interest $144.08, total $1,644.08. July 17, $1,000, November 9, $4,000 and interest $647.11, total amount $4,647.11, November 10 $2,500. The following were paid neither in part or the whole by me, American National bank, Adoue & Lobit, Citizens' Loan Company, George Ketch, Mrs. A. Lowenstein, S. A. Walker and the Irving National Bank of New York. I have two suits pending in the State district court of Galveston county, on this same cause of action, one against the Texas Guarantee and Trust Company, and the other against Moody and others, seeking to recover of those parties same damages as I seek to recover of the defendants in this cause. The depositions to which you have
162 referred was taken in one of those suits. It states and states correctly that up to the last trial I collected and realized on notes, judgments and accounts since I was trustee $61,000, and since then $37,020.20. That includes all collections. I collected nothing since making that deposition September 24, 1895. I was intimate with Mr. Freiberg and Mr. Seinsheimer, and knew Mr. Klein very well. Never had but one business transaction with their firm. I have been buying goods of them, but would not call that a business connection. Bought goods for my own use. I had another transaction with Mr. Freiberg individually, bought a house of him. Had no familiarity with their business. Neither of them ever requested me to act as trustee. I was requested by Mr. Fellman to do so on the Monday preceding Friday the 16th of December, 1892. This I think was in the store of Michael & Co., my brother-in-law, Fellman is a second cousin of my wife, and is the father-in-law of Seinsheimer. Kempner was the brother-in-law of Seinsheimer, married his sister. Grumbach married another daughter of Fellman. He and Seinsheimer married sisters. On the Monday preceding Friday December 16, '92 Fellman requested me to serve as trustee, told me

the boys were in a failing condition, bound to fail, could not keep up. I understood the boys to be the firm of Freiberg, Klein & Co. He may not have said the boys. I knew who he meant. Freiberg, Klein & Co. and they and he requested me through him (Fellman) to act as trustee. The request came through him. They said they were going to make a trust deed. I did not go into the business as a mere favor to these gentlemen. I expected compensation and was promised it by Fellman. He offered me $150 a month to be paid out of the firm or the trust of the firm, or whatever you might call it. It was to come out of the assets. I had no doubt about Fellman's authority to make the proposition. I knew or at least felt that he was authorized to make any proposition which he might make. I did not ask him about his authority. I did not doubt his authority to contract with me. I expected to get my pay out of the trust estate. I knew that Fellman was not the firm making the trust deed, but he told me that he was largely on their paper. At marshal's sale of the goods
163 seized and for the valve in which I sue in this case, I attended about an hour and a half or two hours the first day and a very short time the second day, met quite a number of acquaintances there whom I knew to be in business bidding on goods. Most of them responsible were buyers in business. Bidding was active and competition great. Bidders were from Galveston and Houston and others from interior towns further up. Considerable number of bidders were present. McKinney was there, of Moore, McKinney & Co. Mr. Schneider of Galveston, Henry Freiberg and Mayer of Mayer, Kahn & Freiberg were there. Ullmann or Steifel of the firm of Ullman Lewis & Co. were there, one or both were there. I think Lange of Focke, Wilkens & Lange was there, and Stern and Japhet of Houston, and Henke and W. B. King and Keller and Grumbach of Houston. Houston was well represented at the sale and bid largely. Sale was advertised in the newspapers. I do not know what claims of creditors preferred in the deed of trust were secured by collaterals. I did not pay any other that had collaterals. Some of the debts or notes which I paid off were endorsed. That is a different thing from collaterals. They were endorsed by Fellman & Grumbach, all that I paid at the Island City savings bank were endorsed so, also all those I paid at the First National bank. The notes paid by me showed this fact. The First National bank is not yet paid in full. The Island City Savings Bank debt was paid in full. All those notes were endorsed by Fellman & Grumbach, amounting to $29,000. Claim of the First National bank has been partially paid and as far as paid I have found the obligations to be endorsed by Fellman & Grumbach. I am informed that Fellman & Grumbach are also endorsers on the balance of that claim but do not know it. I have not seen the notes. I do not know that Fellman selected me to administer the trust on account of any particular aptness that I had for such business. He knew I had none, and it would not be reasonable for him to select me on account of such qualifications. I had no acquaintance with the kind of goods kept there, never did any wholesale liquor business,

but have done other wholesale business. Neither Fellman nor Freiberg, Klein & Co., or Seinsheimer could have desired me
164 to serve as trustee on account of my knowledge of the wholesale liquor business.

(Witness was here shown the following documents:—)

THE STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas, we, Moses Freiberg and Joseph Seinsheimer, both of the city of Galveston, in the county of Galveston, *in the county of Galveston*, in the State of Texas, and Samuel Klein, of the city of Dallas, in the county of Dallas, in the State of Texas, partners doing business under the firm name and style of "Freiberg, Klein & Co.," are justly indebted to sundry persons in sundry amounts, and upon sundry obligations, as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible, and in the order and manner hereinafter provided:

Now therefore, in consideration of the premises and of the purposes and trusts hereinafter set forth and declared, we the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over and transferred and by these presents do bargain, sell, alien, convey, assign, set over, and transfer unto Jacob Sonnentheil, also of the city of Galveston, all — singular the following-described personal property, debts, claims, accounts, assets, and the evidence thereof, to wit:

All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse heretofore and now occupied by us as a place of business and belonging to Julius Freiberg on the south side of Avenue B of Strand street, in block numbered six hundred and twenty-four (624) in the said city of Galveston, and also in the warehouse rented by us from George Seeligson, in said block numbered six hundred and twenty-four (624) and fronting on Avenue C or Mechanic street in said city and also in the United States custom warehouse and storehouses in the said city of Galveston, the said stock of goods, wares and mer-
165 chandise consisting of wines, liquors, cigars, glassware and such other articles of merchandise as are usually kept for sale by and in wholesale liquor stores, together with all packages containing the same or kept on hand in stock, for use in our business as wholesale liquor and cigar dealers in, upon, and about the premises aforesaid or any of them.

Also all and singular, the store and office furniture, fixtures, iron safes, tools, trucks, implements, machinery and personal property of whatever and every description belonging to us and situated or contained in or upon the premises aforesaid and used or kept for sale in or in connection with the business heretofore carried on by us upon said premises or any of them.

Also, all and singular, the ice boxes, and faucets, and cash registers, belonging to us, and contained in or upon the premises or any

of them, or in the hands or possession of our various customers in the city of Galveston, aforesaid of which said articles so in the hands or possession of our said customer-, their several and respective receipts are on file in our office and are herewith delivered to the said Jacob Sonnentheil.

Also, fourteen head, more or less of horses and mules being all the animals belonging to us and used in connection with and in the course of our said business and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B or Strand street.

Also, all those certain two buggies and one float and one delivery wagon and all harness belonging to us and used in the course of and in connection with our said business, and usually kept in or about the said stable or shed.

Also, 700 halves and quarter kegs of beer, more or less now situated and contained in two refrigerators rented by us from the Texas Ice & Cold Storage Company contained in their building on the corner of 20th and Avenue A, in the city and county of Galveston aforesaid, and comprising all of the beer owned by us now contained in said building.

Also, all goods, wares, and merchandise or other personal property, heretofore by us in the course of our said business sold, shipped, or delivered to our customers or any of them, but
166 which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

Also, all debts, claims and demands owing to us, or account of transactions made in the course of our said business or otherwise for account of our said copartnership, in whatever form such debts, claims or demands, may be or exist, whether by or upon bills, notes, open accounts or otherwise together with all and singular the evidences thereof, including all bills, notes, vouchers, books of account and *discounts* of every description pertaining to or containing evidence of such debts, claims and demands, or the transactions in which same occurred.

Also, all and singular, the unexpired insurance contracts and policies heretofore effected and still of force upon the property hereby conveyed or any part thereof.

Also, all and singular, our unexpired licenses as wholesale or retail dealers in liquors, cigars, or merchandise.

To have and to hold unto the said Jacob Sonnentheil and to his successors in the matter of this trust and to his or their assigns forever, but for and upon the uses, purposes and trusts and terms hereinafter set forth.

The said Jacob Sonnentheil shall and is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets and value and the evidence thereof, hereinbefore mentioned, and as speedily as possible sell, and convey the said personal property in parcels or as entirety—at public or private sale and collect the said debts, claims

and demands—* ~~and compound, adjust, compromise and settle or sell and transfer and assign such of said debts, claims and demands as may be disputed or insolvent, or of doubtful value upon such terms as in the exercise of a sound discretion may seem to him most advantageous for the parties interested in this trust~~ and out of the proceeds realized therefrom he shall first pay all expenses by him reasonably incurred or paid out in the execution of this trust including the rent of premises, the hire, pay and fees of such servants, clerks, agents, and attorneys as he
167 may employ to assist and aid him in the performance of his duties, and a reasonable compensation to himself, for his own services to be rendered in this behalf, and secondly the following debts owing by us each in the order here set down and in full before those which come after.

| | |
|---|---|
| Amount owing to A. W. Fly temporary administrator about | $3,913 91 |
| Amount owing to B. Kalm about | 1,598 60 |
| Amount owing to the Island City saving banks or other holder or holders and on account of our four certain promissory notes for the sum of $5,000 each and payable to the order of said bank | 20,000 00 |
| Amount owing to the Island City savings bank or other holder and on account of our certain promissory note for the sum of $5,500.10 payable to the order of said bank | 5,500 00 |
| Amount owing to the Island City savings bank or other holder, and on account of our certain promissory note payable to the order of said bank for | 4,000 00 |
| Amount owing to the First National Bank of Galveston or other holder or holders and on account of our five (5) certain promissory notes payable to the order of said bank, each for the sum of $5,000.00 | 25,000 00 |
| Amount owing to the American National Bank of Galveston, Texas, or other holder or holders and on account of our three (3) certain promissory notes each for the sum of $5,000.00 and payable to the order of said bank | 15,000 00 |
| Amount owing to said American National bank or other holder and on account of our certain promissory note payable to the order of said bank for the sum of | 2,500 00 |
| Amount owing to Adoue & Lobit, of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000.00 and discounted with said Adoue & Lobit | 10,000 00 |

* In the original of this instrument six lines on the third page are here expunged by pen marks made over the words there written, said words so expunged in the original instrument are the same as are here crossed out.

Amount owing to said Adoue & Lobit or other holder and on account of our two (2) certain promissory notes each for the sum of $2,500.00 and discounted with said Adoue & Lobit..... 5,000 00

168 Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000.00 payable to the order of said Citizens' Loan Company..... 10,000 00

Amount owing to G. Ketch or other holder and on account of our certain promissory note payable to the order of said G. Ketch, for the sum of..... 5,000 00

Amount owing to Mrs. A. Louenstein or other holder, and on account of our certain promissory note payable to the order of said Mrs. A. Louenstein for the sum of..... 3,000 00

Amount owing to S. A. Walker, or other holder or holders and on account of our three (3) certain promissory notes each for the sum of $5,000.00 payable to the order of ourselves..... 15,000 00

Amount owing to Irving National Bank of New York or other holder or holders of and on account of our three (3) certain promissory notes each for the sum of $5,000.00, payable to the order of said bank..... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification; other descriptive terms when given, are from recollection and belief only, and any mistake committed in such description from memory and belief, shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness; and the entire amounts, principal and interest owing on the debts mentioned, whether such amounts be stated exactly or not, are intended to be secured hereby and are to be paid by the said Jacob Sonnentheil, in the order above given and stated:

And in case, after making all and singular the payments above mentioned and provided for, any surplus or balance of said property and assets, or of the proceeds thereof shall remain the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assigns.

169 Any and all of said property, which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him, shall pass to the purchaser or purchasers thereof, by absolute title and shall be discharged from the further operation of this trust and no purchaser of any of such property, nor any debtor, making payments to the said Jacob Sonnentheil, shall stand charged to see the application of the amounts so paid to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured. (Six lines on page 3rd expunged before signing.)

In testimony of all which we, the said Moses Freiberg and Joseph Seinsheimer and Samuel Klein have signed these presents at Galveston, Texas, the sixteenth day of December A. D. 1892.

MOSES FREIBERG.
SAMUEL KLEIN.
JOSEPH SEINSHEIMER.

THE STATE OF TEXAS, }
*County of Galveston.* }

Before me, James Spillane, a notary public in and for Galveston county, Texas, on this day personally appeared Moses Freiberg, Samuel Klein and Joseph Seinsheimer known to me to be the persons whose name- are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this — day of December A. D. 1892.

JAMES SPILLANE,
*Notary Public for Galveston County, Texas.*

Endorsed: No. 2051. Freiberg, Klein & Co. to J. Sonnentheil. Chattel mortgage. Filed 16th day of Dec'r 1892 at 8 o'clock p. m. A. Wakelee, clerk C. C. G. Co. by H. C. Johnston, deputy clerk.

This is the original deed of trust under which I claim authority to take possession of the property of Freiberg, Klein & Co. as
170 trustee. There was another deed of trust handed me a few days after this, but I already held the goods under this original deed of trust, dated December 16th, 1892.

(The second instrument here mentioned was produced by the witness, and is as follows:)

THE STATE OF TEXAS, }
*County of Galveston.* }

Know all men by these presents, that whereas, we, Moses Freiberg and Joseph Seinsheimer, both of the city of Galveston in the county of Galveston, in the State of Texas, and Samuel Klein of the city of Dallas in the county of Dallas in said State of Texas, partners doing business under the firm name and style of Freiberg, Klein & Co. at Galveston aforesaid, are justly indebted in sundry amounts and upon sundry obligations as hereinafter more specifically mentioned, set forth and described, and are desirous of securing the payment of said indebtedness as speedily as possible, and in the order and manner hereinafter provided. Now, therefore, in consideration of the premises, and of the purposes and trusts hereinafter set forth and declared, we the said Moses Freiberg, and Joseph Seinsheimer and Samuel Klein, have bargained, sold, aliened, conveyed, assigned, set over, and transferred and by these presents do bargain, sell, grant, alien, convey, assign, set over and transfer, unto Jacob Sonnentheil, also of the city of Galveston, all and singular the following-described personal property, debts,

claims, accounts, demands and assets, and the evidence thereof as follows, to wit: All and singular our stock of goods, wares and merchandise by us owned and contained and situated in the storehouse, heretofore and now occupied by us as a place of business, and belonging to Julius Freiberg, on the south side of Avenue B or Strand street in block numbered six hundred and twenty-four (624) in the said city of Galveston, and also in the warehouse rented by us from George Seeligson in said block numbered six hundred and twenty-four (624) and fronting on Avenue C or Mechanic street, in said city, and also in the United States customs warehouse and storehouses in the said city of Galveston, the said stock of goods, wares and merchandise consisting of wines, liquors, cigars, glass-
171 ware and such other articles and lines of merchandise as are usually kept for sale by and in wholesale liquor stores, together with all packages containing the same or kept on hand and in stock for use in our business as wholesale liquor and cigar dealers, in, upon and about the premises aforesaid or any of them; and also all half kegs and quarter kegs and whole kegs of beer estimated at seven hundred more or less, belonging to us and situated and contained in two refrigerators rented by us from the Texas Ice and Cold Storage Company, in their building on the corner of 20th street and Avenue A in the city of Galveston aforesaid.

Also, all and singular the store, and office furniture, fixtures, iron safe, trucks, tools, implements, appliances, machinery and personal property of whatever and every description belonging to us and situated or contained in or upon the premises aforesaid, and used or kept for sale in or in connection with the business heretofore carried on by us upon the premises aforesaid or any of them.

Also, all and singular the ice boxes and faucets and cash register belonging to us and contained in or upon the said premises or any of them, or in the hands or in possession of our various customers in the city of Galveston, of which said articles so in the possession or hands of our said customers their several and respective receipts filed in our office are delivered to the said Jacob Sonnentheil.

Also, fourteen head (14) more or less of horses and mules, being all the animals belonging to us and used in connection with and in the course of our said business, and usually stabled and kept in a stable or shed adjoining said storehouse on the south side of Avenue B or Strand street in said city of Galveston.

Also, all and singular those certain two buggies and one float and one delivery wagon and all harness belonging to us and used in the course of and in connection with our said business, and usually kept in or about the said stables or shed.

Also all goods, wares and merchandise, or other personal property heretofore by us in the course of our said business sold, shipped or delivered to our customers or any of them, but which may have been rejected by the purchaser or purchasers and returned or in transit back to us or held for our account.

172 Also, all debts, judgments, claims and demands, of every nature whatsoever (including claims for rebates, discounts

and deductions on purchases of merchandise) owing to us on account of transactions made in the course of our said business or otherwise, for account of our said copartnership, in whatever form such debts, claims, judgments, or demands may be or exist, whether by or upon bills, notes, open account, judgment or otherwise, together with all and singular the evidences thereof, including all bills, notes, decrees, judgments, vouchers, books of account and documents of every description pertaining to or containing evidence of such debts, claims, judgments and demands, or the transactions in which the same accrued.

Also, all and singular the unexpired insurance contracts and policies heretofore effected and still in force on the property hereby conveyed or any part thereof.

Also all and singular our unexpired licenses as wholesale and retail dealers in liquors, wines, cigars or merchandise.

To have and to hold unto him the said Jacob Sonnenthal and to his successors, if any in the matter of this trust, and to his or their assigns forever, but for and upon the uses, terms, purposes, conditions and trusts hereinafter set forth and declared.

That said Jacob Sonnentheil shall, and he is hereby authorized and directed to take immediate and complete charge, possession and control of all and singular the property, assets and values, and the evidences thereof hereinbefore mentioned and transferred, and as speedily as possible sell and convey the said personal property in parcels, or as an entirety at public or private sale and collect, adjust, compromise or sell at public or private sale the said debts, claims, judgments and demands, and out of the proceeds realized therefrom he shall pay first, all expenses by him reasonably incurred or paid out in the execution of this trust, including rent or hire of premises, insurance, and the hire, pay, wages and fees of such servants, clerks, agents and attorneys as he may employ to assist and aid him in the performance of his duties and a reasonable compensation to himself for his own services to be rendered in this
173 behalf, and secondly the following debts owing by us, each in the order herein set down, and each in full before those which come after, — to say:

| | |
|---|---|
| Amount owing to A. W. Fly, temporary adm'r, about.. | $3,913 91 |
| Amount owing to B. Kahn, about..... | 1,598 60 |
| Amount owing to the Island City Savings Bank of Galveston or other holder or holders, and on account of our four (4) certain promissory notes for the sum of $5,000.00 each, and payable to the order of said bank | 20,000 00 |
| Amount owing to the said Island City savings bank or other holder and on account of our certain promissory note, for the sum of $5,500 00 payable to the order of said bank..... | 5,500 00 |
| Amount owing to said Island City savings bank or other holder and on account of our certain promissory note, payable to the order of said bank for the sum of..... | 4,000 00 |

Amount owing to the First National of Galveston or other holder or holders, and on account of our five (5) certain promissory notes payable to the order of said bank, each for the sum of $5,000.00..... ..... 25,000 00

Amount owing to the American National Bank of Galveston, Texas, or other holder or holders and on account of our three (3) certain promissory notes, each for the sum of $5,000.00, and payable to the order of said bank..... ..... 15,000 00

Amount owing to the said American National bank or other holder, and on account of our certain promissory note payable to the order of said bank for the sum of..... 2,500 00

Amount owing to Adoue & Lobit of Galveston, Texas, or other holder or holders and on account of our two (2) certain promissory notes each for the sum of $5,000.00, and discounted with said Adoue & Lobit.... ..... 10,000 00

Amount owing to said Adoue & Lobit or other holder or holders and on account of our certain two (2) promissory notes — for the sum of $2,500.00 and discounted with said Adoue & Lobit..... ..... 5,000 00

Amount owing to the Citizens' Loan Company of Galveston, Texas, or other holder or holders of and on account of our two (2) certain promissory notes each for the sum of $5,000.00 payable to the order of the said Citizens' Loan Company..... 10,000 00

174 Amount owing to G. Ketch or other holder of and on account of our certain promissory note payable to the order of said G. Ketch for the sum of.... 5,000 00

Amount owing to Mrs. Lowenstein or other holder and on account of our certain promissory note payable to the order of the said Mrs. A. Lowenstein, for the sum of..... ..... . 3,000 00

Amount owing to S. A. Walker or other holder or holders of and on account of our three (3) certain promissory notes, each for the sum of $5,000.00 payable to the order of ourselves..... ..... 15,000 00

Amount owing to the Irving National Bank of New York or other holder or holders of and on account of our three (3) certain promissory notes, each for the sum of $5,000.00, payable to the order of said bank.... ... 15,000 00

The actual indebtedness owing by us on the above-mentioned items of indebtedness, is approximately represented by the figures set opposite the several items and the parties with whom the several items were originally contracted are also indicated by way of description and identification; other descriptive terms when given are from recollection and belief only, and any mistake committed in such description from memory and belief shall not be held to avoid the security hereby intended to be given for the payment of such indebtedness, and the entire amounts, principal and interest, owing

on the debts mentioned, whether such amounts be stated exactly or not are intended to be secured hereby, and are to be paid by the said Jacob Sonnentheil in the order above given and stated.

And in case, after making all and singular the payments above mentioned and provided for any surplus or balance of said property and assets or of the proceeds thereof shall remain the said Jacob Sonnentheil shall pay over and deliver such balance to us or to our assigns; and any and all of said property which may be sold by the said Jacob Sonnentheil under the authority herein conferred on him shall pass to the purchaser or purchasers thereof by absolute title, and shall be discharged from the further operation of this trust and no purchaser of any of such property nor any debtor making payments to the said Jacob Sonnentheil shall
175 stand charged to see to the application of the amounts so paid, to the payments hereinbefore directed to be made by the said Jacob Sonnentheil on the indebtedness hereby secured.

And we hereby covenant and agree with the said Jacob Sonnentheil and with the holders of the indebtedness hereby secured, that we will make, execute and deliver to the said Jacob Sonnenthiel such other and further transfer, assignments and assurances of title, in particular to any or all of all said property and assets as and when the same be advised or required under advice of counsel or as may be reasonably requisite or proper in order to facilitate and expedite the execution of this trust by the said Jacob Sonnentheil, and we do hereby authorize and empower each and every one of the said partners in the said copartnership of Freiberg, Klein & Co. in the name of the said copartnership and in the names, places and stead of each of said partners therein to make, execute and deliver any and all such further transfers, assignments and assurances of title in particular, with like effect as though the same were made, executed and delivered by each of us in person.

This instrument is made to secure the same indebtedness as that mentioned in a certain deed of trust in the nature of a chattel mortgage, made, executed and delivered by us to the said Jacob Sonnentheil under date of December 16th, 1892, and intended to cover the same assets and property, and is designed to still further assure the speedy and convenient execution and performance of the same general purposes, and not to in anywise impair, but to confirm and increase the security given by the said deed of trust in the nature of a chattel mortgage heretofore executed as aforesaid.

In testimony of all which we have signed these presents this 17th day of December, A. D. 1892 at Galveston aforesaid.

MOSES FREIBERG.
SAM. KLEIN.
JOSEPH SEINSHEIMER.

Witnesses at request of grantors:

LEO N. LEVI.
S. J. S. LUCAS.

176 THE STATE OF TEXAS, }
*County of Galveston.* }

Before me, I. Lovenberg, a notary public in and for said county of Galveston, on this day personally appeared Leo N. Levi, known to me to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me, stated on oath that Moses Freiberg, Sam. Klein and Joseph Seinsheimer, the grantors or persons who executed such instrument of writing severally acknowledged in his presence that they had executed the same for the purposes and consideration therein expressed, and that he, the said Leo N. Levi, together with S. J. S. Lucas, had signed the same as witnesses at the request of said grantors.

Given under my hand and seal of office at Galveston, Texas, this 20th day of December, A. D. 1892.

I. LOVENBERG,
*Notary Public for Galveston County, Texas.*

I took possession under the first of these instruments and a few days afterwards the other was given to me. I profess to hold under both of them. I took possession under the first and held under it until the second was made and since then claim to hold under both. The first instrument I got Dec. 16, 1892, at the store of Freiberg, Klein & Co. I had been told it would be there at some time, but did not know the time. I was ready to take charge any time they sent for me. When I got the paper December 16th, I went to the court-house and filed it with the clerk the same evening. I filed it within half an hour or three-quarters after I received it. The official file-mark on it, 8 o'clock p. m. is about right. I got to the store about half past seven, was called from my supper between seven and eight. Seinsheimer went with me to the court-house. I think Fellman was along. I am almost sure of it. I met Mr. Smith (of Scott. Levi & Smith, attorneys) that evening. I don't think he went into the court-house with me. I do not think any one told me to file the deed. I did it because I thought it was
177 necessary to file such a document and the ordinary way of doing business of that sort, considered it necessary and proper to file the paper at once. I had no counsel at that time. Sought none upon that question that night. Was content to rely on my own information as to that matter and was satisfied that it was proper to file the deed. No other record than the filing of that trust deed on December 16, 1892 was ever made, no other authority was ever filed by me. The second deed of trust was given me a very few days after, not over three days, I think. I think it was Monday morning, it may have been Tuesday, it occurred to me to file this second deed of trust. I asked Mr. Levi of Scott, Levi & Smith, attorneys, whether I should file it. He said no, it was not necessary. I felt that I should take advice concerning the filing of the second deed of trust. The two instruments coming right together and embracing the same trust substantially I did not know whether it was necessary to file the second one or not, and I asked either Mr. Levi or Mr. Scott about it. I had had no experience of that sort. It was

getting beyond me. Scott, Levi & Smith wrote both of the instruments. I recognize the handwriting but did not see them write it. Scott or Levi told me it was not necessary to file the second deed and I did not file or record it. It has been in my tin box ever since until the time of the trial in the district court, when Mr. Levi asked me to let him have it and I did so and he has had it ever since. The following language in the original deed of trust, to wit, "also 700 halves and quarter kegs of beer more or less now situated and contained in two refrigerators rented by us from the Texas Ice & Cold Storage Company contained in their building on the corner of 20th street and Avenue A in the city and county of Galveston aforesaid, and comprising all of the beer owned by us now contained in said building" was not in it when it was first given to me. It was put in there on my way to the court-house that evening by Mr. Smith of Scott, Levi & Smith. His room was near the court-house and I went to his room. Seinsheimer mentioned to me after I left the store on my way to the court-house that the beer had been forgotten or something, and as Mr. Smith lived right around the corner from the court-house, we went to him to get him to make this addition, to the best of my recollection.

(The said deeds of trust were read in evidence.)

178 I discovered after I had the list of claims placed with me as trustee that there were some bills receivable in the list that were not turned over to me. Think Mr. Freiberg told me of it first, said he thought I would find $20,000 of bills receivable that ought to be there were not there. Mr. Seinsheimer had them in his possession. I told Freiberg I thought I was entitled to those papers, but would see my lawyers about it, and take their advice. I did so, went to Scott, Levi & Smith, told them there were $20,000 notes and bills receivable on the list and not turned over to me, and wanted to know whether I should make demand on Seinsheimer for them. They (Scott, Levi & Smith) said by all means make demand on him at once which I did on Seinsheimer personally. I do not know that I told him I had spoken to my lawyers about it, but did tell him there were $20,000 bills receivable not there which should be there and I wanted them, that I heard he had them, and I wanted them right away. He had them at home and went there to get them. This was on Monday following Friday the 16th of December. I am a competent book-keeper, have kept and still keep books of my own. I have looked on the books for an entry to the credit of the trust made about February 23rd of $180 on account of Jas. E. Burke paid by a man named Brown and signed by Seinsheimer for Freiberg, Klein & Co. I did not find it on my books. There is no such entry of any money received.

(Defendants here showed to the witness the following document—No. 1: Letter on letter-head of Freiberg, Klein & Co.:

JAN. 16TH, 1893.

Mr. E. Brown:

Please accept order of Freiberg, Klein & Co. for $180 on policy and oblige.

Respectfully, JAS. E. BURKE."

"No. 2. JAN. 17TH, 1893.

Messrs. Freiberg, Klein & Co.

DEAR SIRS: Jas. E. Burke has assigned an insurance policy to me. As soon as I collect the same I will hold out for you $180.

Respectfully, E. BROWN."

179 On the same letter No. 2 and following the above is as follows:

"Paid the above in full. Freiberg, Klein & Co. 2—23—'93." Concerning which witness testified:

"I have seen these papers before. The names of Freiberg, Klein & Co. on the bottom of No. 2 looks like Joe Seinsheimer's handwriting."

(This being the state of the evidence defendants' counsel offered to read said documents in evidence to the jury.)

(Plaintiff's counsel objected to the introduction thereof in evidence, because they relate to a transaction subsequent in point of time to the deed of trust of Dec. 16, 1892, and neither the trustee nor beneficiaries in said trust deed were shown to have any knowledge thereof or any connection therewith, which objection was overruled by the court and the documents were read in evidence to the jury, and to this ruling of the court and the reading of said documents in evidence to the jury the plaintiff then and there excepted and still excepts. (Exception No. 1).

Witness, resuming said, "No charge against that party appears on the list of assets. It was never paid to me and never credited. I have the cash book of Freiberg, Klein & Co."

(Same being produced and witness asked to look at the date Dec. 24, 1892, testified:)

These books have been in my charge all the time, and are still. They are Freiberg, Klein & Co.'s books. I got them in connection with the assets of the concern after I went in there as trustee. Have had them ever since. All the entries in these books after December 16th, 1892, are in Seinsheimer's handwriting, the member of the firm of Freiberg, Klein & Co.

(Witness' attention was here directed to the following entries in said books of Freiberg, Klein & Co.:)

"Profit and loss. To cover difference in cash occasioned by amount short in various ways during absence, etc., since February, 1891, $2,416.47," concerning which the witness testified:

"The books show that the last date above and preceding
180 that entry is December 24th, 1892," and in connection therewith the witness examined for defendants testified preliminarily:

"This entry indicates that there was so much cash short and it was accounted for in that way, charged to profit and loss. I do not think I ought to have had that money. It may have been missing for years before. It is merely an entry accounting for it, and shows that they had the money and in some manner it got away from them. A corresponding entry to this appears in the ledger of Freiberg, Klein & Co., under the same date. Opposite the entry in the ledger there may have been a blot, something is scratched. Seinsheimer was book-keeper for me after I took possession until the deed of trust; during the time he acted he also made entries on the books of Freiberg, Klein & Co. I knew that he was making entries in those books. I did not object to it, and permitted it. I did not know what such entries were that he made in those books. I did know what entries he made in my books. That came under the administration of my trust. I did not look at the entries he made in the books of Freiberg, Klein & Co. I was not interested in that. I kept a separate set of books in which were entered all the transactions relating to my trust, and looked into the books of Freiberg, Klein & Co. only for the purpose of finding out what belonged to me as trustee or to get the items of an account when it was to be settled, and for no other purpose."

(This being the state of the evidence the defendants offered to read and exhibit the said entries in said books of Freiberg, Klein & Co. to the jury as evidence in the cause and to the admission of said entries in evidence and the exhibition thereof to the jury plaintiff objected, because the said entries were shown to have been made by Seinsheimer, one of the firm of Freiberg, Klein & Co., on or after December 24th, 1892, subsequent to the execution, delivery and acceptance of the said deed of trust under which plaintiffs claim, and because, further, the entries related to cash shortage from February, 1891, to the date of the entry and the said deed of trust gave the trustee no interest in the cash whatever, and he had no right to claim from Freiberg, Klein & Co. any cash, and the entry was
181 the mere admission after the fact by a person who may have been interested in keeping a memorandum with which the plaintiff had nothing to do and because the meaning of the entry was shown to be that this amount of cash was short in the mercantile transactions of Freiberg, Klein & Co. since February, 1891, and it should be charged to profit and loss, and because said entries and the matters to which they refer did not concern or affect the trustee or the deed of trust, and were irrelevant and incompetent as evidence in this cause and because, further, that if in anywise admissible against the trustee said entries as evidence could not affect the beneficiaries in the trust deed without showing that they knew of and participated in whatever fraud or improper conduct on the part of Freiberg, Klein & Co. or of the trustee was reflected by said entries, and no such knowledge or participation was shown on the part of said beneficiaries.)

(All of said objections were by the court overruled and the evidence admitted and exhibited to the jury as proposed by defendants

subject to being thereafter controlled by the court, all of which said objections were overruled by the court, the court saying in that connection "I will admit this testimony until all the evidence is in. I do not know what connection will be made or what proof will be offered, nor can I say now what the proof is for. I will admit it as a circumstance tending to prove fraud, solely as a circumstance in connection with the claim that there was in fact no change of possession, and for that reason I permit the evidence to go in and all of these matters will be subject to the control of the court hereafter," but the court neither by the charge or otherwise excluded, or in any manner alluded to or controlled said evidence thereafter during the trial, and to the ruling of the court admitting said evidence and to the admission thereof to the jury as aforesaid, plaintiffs then and there excepted, and still except-, and also excepted and still except- to the failure of the court thereafter to exclude, or in any manner by charge or otherwise allude to or control said evidence during the trial. This being plaintiff's exception No. 2.)

182 There was an entry in my books which showed Fellman owed $5,000. This entry was on the books of Freiberg, Klein & Co. before I went in there, and I found it afterwards. That was on my books, the books I kept as trustee. It was in both sets of books. I had it put on my books from the books of Freiberg, Klein & Co. I learned this when I first came here. It showed on the books that Fellman owed the concern $5,000. I wrote to Fellman that he owed me $5,000 as trustee and requested his check for the amount. I thought it was about time, he had been absent a long time from the city during the spring of 1893; when he returned I wrote him a note saying that I found on my books he owed me as trustee $5,000 and requested him to send me his check for the amount. He did not do so. He did nothing for some time. I think I wrote him that I expected an answer to my letter and the check, and demanded the money of him.

Counsel for defendants offer said entries in the books of Freiberg, Klein & Co. and in the books of the trustee showing a charge of $5,000 against Fellman, which was the entry taken from the books of Freiberg, Klein & Co. and entered in those of the trustee. Also the following letter from L. Fellman to J. Sonnentheil:

"GALVESTON, TEXAS, *May* 15, 1893.

J. Sonnentheil, Esq., trustee, etc.

DEAR SIR: In reply to your favor of the 27th ult. I beg to say the $5,000 mentioned in it was used by me to pay off claim held by H. Kempner against Freiberg, Klein & Co. upon which I was a surety and which was also secured by collaterals of little value compared with the amount of the debt. Further, I am a surety for Freiberg, Klein & Co. upon a large amount of their paper and I do not propose to pay over any money to them or their trustee until this paper has been satisfied.

Respectfully, L. FELLMAN."

Said letter being in reply to those previously written by Sonnentheil to Fellman, and concerning said letter the witness Sonnentheil testified:

Upon receipt of this I went to my attorneys and asked them whether I should be satisfied with his explanation, or should
183 file suit for the $5,000. They asked me not to file suit, but I should make Fellman give me an account of the securities he held against this claim. I then wrote Mr. Fellman to please let me know what the securities were that he spoke about, and in reply he wrote me the following letter:

"GALVESTON, *May 31st*, 1893.

J. Sonnentheil, Esq., trustee Freiberg, Klein & Co.

DEAR SIR: Replying to your favor of the 24th inst., I beg to say that I hold an abstract of judgment of George G. Edloff against the G. C. & S. F. R. R. Company and the Atchison, Topeka and Santa Fe, dated April 25, 1893 for $2,462.59 bearing interest at the rate of 6 % per annum. I beg also to enclose to you a statement of account of J. J. Eckford, trustee, H. Kempner, beneficiary, which is self-explanatory. I also enclose you a bill for expenses amounting to $70.55. From the Eckford account you will see that I have paid out $136.85. Upon reimbursement to me of these amounts, I beg to advise you that I am willing to surrender to you collaterals now in my hands.

Respectfully, L. FELLMAN."

The trustee's accounts referred to in said letter *is* as follows:

Account of J. J. Eckford, trustee of Freiberg, Klein & Co.; H. Kempner, beneficiary.

Dec. 31, 1892.—The Glen Lee outfit sold for $940 against which there was a past rent lien of $740 leaving a balance of $200 cash.

May 15, 1893.—The Randall Café outfit was sold to George G. Edloff for a judgment he held against the G. C. & S. F. and A. T. & S. F. R. R. Co. amount- to $2,462.59, estimated at the cash value of $2,000.

*Account of Cash Received by Mc.*

| | | |
|---|---|---|
| Dec. 31, 1892. | To cash for Glen Lee..... | $940 00 |
| May 15, 1893. | To cash from L. Fellman..... | 136 85 |
| May 15, 1893. | To cash insurance premium returned... | 47 95 |

184 *Disbursements.*

| | | | |
|---|---|---|---|
| Dec. | 31. | By rent due on saloon..... | $740 00 |
| Dec. | 31. | By watchman Glen Lee..... | 2 00 |
| Dec. | 31. | John Devine, inventorying café... | 2 50 |
| Dec. | 31. | Two telegrams..... | 50 |
| Jan. | 5. | By insurance..... | 119 75 |

| | | | |
|---|---|---|---|
| March 13. | Holdeman at café | $10 00 | |
| March 16. | " " " | 8 00 | |
| March 31. | " " " | 7 50 | |
| May 11. | Telegram | 35 | |
| May 15. | Holdeman at café | 50 00 | |
| May 15. | Gas | 59 20 | |
| May 15. | Commission trustee | 125 00 | |
| | | $1,124 80 | $1,124 80 |

The bill of expenses referred to in Fellman's letter is as follows:

May 27, 1893, Mr. J. Sonnentheil, trustee, bought of Fellman & Grumbach.

| | |
|---|---|
| Expenses Mr. S. Lyon to Dallas and return | $25 80 |
| Telegram | 65 |
| Taxes | 9 10 |
| | $70 55 |

In connection with the foregoing correspondence and book entries relative to the subject of the $5,000 claim of *by* Sonnentheil counsel for defendants offered in evidence also a deed of trust from Freiberg, Klein & Co. to J. J. Eckford, to secure H. Kempner for a debt of $5,000 by lien on property in Dallas, Texas, known as the Randall café and the Glen Lea saloon. Also two notes of $2,500 each, signed by Freiberg, Klein & Co. and Fellman & Grumbach, payable to the order of the makers, and marked on the back, "Paid by L. Fellman. H. Kempner." The notes were dated December 30, 1892, and December 18, 1892. They offered, also, an abstract of a judgment in favor of G. Edloff *vs.* the G. C. & S. F. R'y Co., and A. T. & S. F. R. R. Co. for $2,462.59, dated April 25, 1893, which judgment was shown to have been taken in payment for the
185 Randall café, one of the collaterals securing the above debt, and to have been transferred by Fellman to the trustee upon the latter paying Fellman the amount advanced by Fellman in the matter of the Eckford collaterals, and said judgment being all that was left of the Eckford security after paying expenses. The trustee took this judgment from Fellman and still owns and controls it. It was also shown that Fellman was security for Freiberg, Klein & Co. on a large amount, more than $100,000 of their indebtedness besides the Kempner claim. The trustee Sonnentheil never knew anything of this deed of trust to Eckford to secure Kempner until after receipt of Fellman's letter of May 31st, above mentioned, and there was no evidence that any of the accepting creditors had any knowledge of said deed of trust. Such being the state of the evidence, the plaintiff objected to the introduction of the evidence so above offered by the defendants in relation to the $5,000 claimed by Fellman of Sonnentheil and the Eckford deed of trust and other security and correspondence and documents connected with the same matter as above stated, because said evidence was irrelevant

and referred to matters occurring after the deed of trust to Sonnentheil had taken effect, and was incompetent to affect the validity of said deed of trust or the interest of the trustee or of the beneficiaries under said deed of trust.

(The court overruled the objection and admitted the evidence to be read and the same was read to the jury over said objection and to the ruling of the court upon said objection and to the admission of the said evidence notwithstanding said objection the plaintiff then and there excepted, and still excepts.)

(Exception No. 3.)

(In connection with the same subject defendant offered to read in evidence the following letter from H. Kempner to J. J. Eckford, the trustee in the deed of trust last named :)

GALVESTON, TEXAS, *May* 10, '93.

Mr. J. J. Eckford, Dallas, Texas.

DEAR SIR: In the matter of Messrs. Freiberg, Klein & Co., Mr. Jacob Sonnentheil of this city is trustee for all their estate, property and assets, and the property assigned, for my benefit in
186 Dallas or proceeds of same should be accounted for and paid to him. Please deliver or pay to the order of Mr. Jacob Sonne-theil trustee of Freiberg, Klein & Co. all matters, moneys, &c. in your hands which have been or may now be held for my benefit.

Yours truly, H. KEMPNER.

(To the introduction of which letter in evidence, plaintiff objected because the same was *res inter alios acta* so far as the plaintiff was or is concerned. It accrued after the deed of trust of Freiberg, Klein & Co. to the plaintiff took effect, and is irrelevant, incompetent to affect the validity of said deed of trust or the rights of the plaintiff thereunder or of the beneficiaries therein.)

(The court overruled said objection and permitted the said letter to be read in evidence to the jury notwithstanding, as part of the history of the matter to which it related, and to the said ruling of the court and the administration of said letter in evidence the plaintiffs then and there excepted and still excepts.)

(Exception No. 4.)

Re-examined by his own counsel, witness SONNENTHEIL further testified:

I obtained from Fellman transfer of the judgment against Edloff. I paid Fellman the amount of his outlay, $136; for Eckford and his bill of expense, $70.55. I had to do this in order to get the judgment transferred to me. I never knew anything about the Eckford trust deed until I received Fellman's letter in May, 1893. All this was done under advise of my lawyers. The Edloff judgment has been on appeal. It has lately been affirmed by the court of civil appeals of Dallas in my favor against the railroad company. I have not got the money yet. I had no connection whatever with the Eckford instrument until May, 1893. The judgment was transferred to me June 5, 1893. The interlineation in the deed of trust from Freiberg, Klein & Co. to myself, under date of De-

cember 16, 1892, of 700 halves and quarter kegs of beer was made before the deed of trust was filed with the county clerk in the presence of Mr. Seinsheimer and, I think, Mr. Fellman. Seinsheimer directed the interlineation. After Mr. Smith had made the interlineation as directed by Mr. Seinsheimer, he gave it to Mr. Sein-
187 sheimer who again handed it to me. Then he went and filed it. The lines expunged or erased in the orignal deed of trust of December 16, 1892, as recited in the last clause, were expunged before the instrument was delivered to me. I took charge of the store the evening of the day that the deed of trust was delivered to me, December 16, 1892, took the keys of the establishment and thereafter exercised jurisdiction and control of it. No one else had possession or control there but me. All who were employed there in the management of the affairs of the trust were under my direction, and I employed them. I made no agreement with anybody about employment in the matter of the trust before I took charge and possession of the property. I told each of the employees that as long as I had use for them and their services were satisfactory I would employ them, but not another day after I had use for their services. I was under no obligation to keep any of them. After the stock was seized by the marshal I discharged Mr. Klein of my own motion, thinking I could save that much money and that he was not strictly necessary any further. I employed Mose Freiberg. Joe Seinsheimer and Sam. Klein each at a salary of $300 per month. We fixed the salary between us. I did not like to pay that much, but they said they would have to give all their time to the business and they could not and would not work for less. I thought they ought to work for less, but they would not do it, and under the circumstances I thought it would be best to employ them, after consulting with my lawyers. Without the help of one or more of them it would have beeen impossible for me to have gotten along in the administration of the trust. Joe Seinsheimer knew more about the business than anybody else. Next to him Mose Freiberg. I don't know how about Mr. Klein. I saw very little of him and could not judge of his familiarity about the business. Grelling was familiar with it. I had known him personally, met him every day, did not know Mr. Lucas previously, nor Meriwether. I employed all whom I retained in my service because I thought I could best administer the trust speedily, for the general benefit of the beneficiaries of the deed of trust and all parties by retaining the old hands, anyhow for a time.

I made no attempt to conceal the fact that I employed these
188 people as my servants. I never concealed it, it was all open, nor did I ever make any effort to conceal the fact that I was there in exclusive charge of the business. I informed every one of the employees as I met them that day I was in charge there, that they were under my orders. If they were satisfied to remain as long as I would need them I would pay them the same salaries, but I could not tell how long I would need them. They must not think it was an engagement for a time. I did not know how long I might have the store, I might sell it out in bulk. I did not know. I think the next day after I took charge of the store the fact was well known

all through the city of Galveston. It was mentioned in the daily newspapers and my connection with the matter as trustee was notorious. I signed all checks made by myself, as trustee, no one signed my name as trustee with my permission. No correspondence was done without my permission. No one signed letters without my permission. Mr. Seinsheimer dictated the letters to the stenographer after consulting me relative to the collection of drafts that I drew. I signed those letters. I conducted all the correspondence with the creditors of Freiberg, Klein & Co. Some letters that came to me from creditors I answered, that is perhaps I had Mr. *Sonnentheil* dictate the letters to Mr. Lucas, but I signed them. All my correspondence as trustee was conducted in the same manner. I read all papers before signing them, frequently modified them and had them written over. I had no knowledge whatever of any fact or circumstance, when I became trustee and accepted the trust that indicated or suggested that the deed of trust was made for any other purpose than to secure the payment of the claims, therein named. I got along very well with the members of the firm of Freiberg, Klien & Co. after I became trustee. We differed sometimes on settlements with customers. I demanded of Seinsheimer $20,000 bills receivable that he had at the time and got that from him. I also got from them a policy of life insurance on a man by the name of Randall in Dallas. It was in the safe I think. When I took charge I had not seen it. I think Mr. Klein in Dallas undertook to collect the policy. It was for $5,000 on the life of Ed. Randall for the benefit of Freiberg, Klein & Co. When I heard of it, I de-
189 manded the policy and got it with difficulty and collected it.

I had difficulty in getting the policy and in collecting it too. Mr. Klein, in Dallas, claimed that he had paid the premiums on the policy and that Randall owed him personally for the premium and that he was entitled to the proceeds of the policy. Freiberg, Klein & Co. told me that they had taken the café from Randall and that the café was largely indebted to the firm, but that they had settled with Randall and taken the café in settlement, and that Randall owed them nothing. At the time the policy became a claim the books showed that Randall owed Freiberg, Klein & Co. about $5,158.47. When I claimed the policy they told me that they thought that Mr. Klein was entitled to the policy because he paid the installment and premium and Randall owed him for that. I mean by them Joe Seinsheimer, Mose Freiberg and Sam. Klein. They said that Randall's indebtedness to the firm had been settled by the transfer to them of the Randall café. Immediately after Randall's death I insisted on the delivery of the policy to me. I did not get it at once. I think they stated the policy was in Dallas. I finally got it. Mr. Klein protested against my taking it. I told him I did not consider his claim against the policy had anything to do with me. If he loaned Randall any money to pay his premium I did not think I had a right to pay that back. I collected the policy and after paying the amount from the proceeds which Randall owed Freiberg, Klein & Co., I paid the balance, some $1,300 or

$1,400, to Mrs. Randall, the widow of the deceased Ed. Randall. After discharging Mr. Klein, as above stated, I re-employed him to collect the outstandings in northern Texas. I understood he had sold the parties and he knew the customers and all about their accounts. I re-employed him about a week or ten days after I discharged him. It was suggested to me by Mr. Freiberg when he found out that I had discharged Klein that I had made a mistake, that Klein was the only one in the house that was well acquainted with those accounts, which were large, in the northern part of the State, and it was better to let him collect those accounts for the benefit of the trust. I thought there was something in this and
190 asked my lawyers and was advised by them to retain Klein. I also spoke to Lasker about it. He thought it was best to retain him because he would make a good deal more than the difference between what I might get somebody else for not acquainted with the accounts and the customers up there, and what he might get out as he had been there and managed that department of Freiberg, Klein & Co.'s business.

Mr. Lasker represented the Citizens' Loan Company, the First National Bank of Galveston and the Island City Savings Bank of Galveston, who were creditors named in the deed of trust in which I was trustee. He advised me to re-employ Sam. Klein, because he thought the difference between what I would pay Klein and some one else would be more than saved by his familiarity with the accounts in north Texas. I am largely interested personally in the First National Bank of Galveston, and the Citizens' Loan Company and in the Island City savings bank, and know that Lasker was an officer in each of them. The $180 for which receipt signed in the handwriting of Seinsheimer, February 23, '93, which was shown here yesterday, appeared to be a collection from a man named Burke. No such claim was ever turned over to me as trustee. None such was disclosed by the books of Freiburg, Klein & Co. I do not know what it was about, did not know what it was about when it was collected. The first I ever learned of that item was on the morning of the trial of the case in the district court. Major Hume showed me that paper and requested me to see my books, whether I had any entry of it. I never had any knowledge of it before; the date of the trial in the district court was January 8, '94. I made no entry nor did I ever have any made in the books of Freiberg, Klein & Co. relating to any matter subsequent to my taking charge as trustee. I looked into those books to see what was coming to me when I had a statement to make for a debtor. That is one that I could collect. I opened a separate set of books for myself immediately on becoming trustee to keep the accounts of the trust. That set of books is here. They are open to inspection by any one. They are entirely separate and distinct from the books of Freiberg, Klein & Co. They have no entry in them except those relating to my administration of the trust. They were kept under my direc-
191 tions. I inspected them every day. The old books of Freiberg, Klein & Co. were stored in their office after I became trustee. Seinsheimer made entries in them with my knowledge

after I became trustee. I understood he was just running those books along. They could only refer to payments made by parties that owed, at least so I understood. He credited up those amounts after money was in my hands, just the same as I would have credited up accounts in my books. I am not sure, however, I never supervised him. I never had anything to do with those books of Freiberg, Klein & Co. Did not control them nor care what went into them. They were turned over to me as trustee. I know now about the cash entry which I was called upon to look at here on this trial in Freiberg, Klein & Co.'s cash book. I was not present when that entry was made and my first knowledge of the fact that it had been made was during the trial in the district court January, 1894, something over a year after it appeared to have been made. I permitted Seinsheimer to make entries in those books at his request. I had no knowledge when I accepted the trust of any facts reflected by that entry and no other knowledge now about it, further than I gleaned from the entry itself, and my testimony as to what it means is simply my opinion as a bookkeeper, and not from any knowledge of facts. I have remaining in my hands of trust funds about $4,500 in cash, but little more or little less. The remaining assets consist of accounts, notes and bills receivable, and the Edloff judgment against the railroad company. The accounts and notes are insolvent. I also have a suit in some court in Illinois against a distilling trust there, and the claim which I sue on in this suit for the seizure of the stock of goods. The notes and accounts are all insolvent. I have been able to collect but very little of them. I have tried to collect diligently. They aggregate about $200,000 more or less, and form part of the $317,000 and odd dollar item mentioned in the list of assets testified to above.

(Witness was asked to examine his books and state accurately the amount of the uncollected notes, accounts and judgments, and after such examination, said:)

In round figures they amount to $157,000. I was mistaken
192 in stating them at $200,000. These claims are insolvent and uncollectible. I could put no value on them. The rebate on those whiskey vouchers is included among those claims, the same as I stated were in suit in Illinois. That suit has been tried. I do not believe that it is finally determined. I lost it on the trial. The litigation is still pending. I stated under examination of counsel for defendant that I did not know exactly what the vouchers sued on in Illinois signified, and I do not know. I do not know whether or not they relate to any whiskey in my possession at that time, or whether they relate to whiskey that had been previously disposed of. I do not know what they relate to. Of the trust assets I have remaining about $4,500 in cash, some $2,500 in the Edloff judgment, and outside of that nothing but these uncollectible, insolvent notes and accounts, those suits in Illinois, and my claim for damages for the seizure of the goods by the marshal and the little office furniture, the safe and two or three desks and the letter file are worth perhaps $300. I

have two suits pending in the State court on account of this same seizure by the marshal, claiming the same amount in each of them as I am in this. I am advised that I can only recover the value of these goods once. Of the claims secured by the deed of trust there are $93,000 unpaid. If I had the goods, the merchandise and property this suit is for, or the value of them which I sue for, in addition to what I have on hand there would not be enough to pay all the claims secured by the deed of trust. The assets turned over to me amounting to $317,000 and odd dollars, included the insolvent claims and notes above mentioned, indeed everything that was turned over to me; the $317,000 is nominal value, the value of all the assets, assuming our claim for merchandise is an asset. The estate was of a greater value when I received it because I collected part of the debts and sold part of the goods and paid out part of the proceeds. There were $317,000 worth of stuff, one kind and another, that was turned over to me. Assuming that enough will be realized when I get through with the assets to pay $135,000 of the debt and the expense of the administration, that would be the value of the estate as it was administered. Nothing has depreciated. It has not depreciated at all. It has not been wasted.

193 The estate was not quite the amount that was secured by the deed of trust because I considered it would not pay out—satisfy everything at its value. That was my estimate at the time. I collected a little more money than I thought I would in the nature of the accounts as they were represented to me. The first inventory about which I testified that in round numbers it amounted to $70,000 did not include live stock and rolling stock, but only the stock of merchandise in the store and warehouse and the beer. Besides, there were store fixtures to the amount of $579.50, office furniture, 580, live and rolling stock, $1,658, and refrigerator and faucets, $863. The wagons and live stock were seized and the beer faucets, but not the office fixtures. The second inventory amounted to $84,000, included the live and rolling stock and faucets. The first inventory, to have been complete, would have to be increased to the extent of $3,511 in round numbers, and aggregate $73,511 about. Some beer came after I took possession as trustee. It was shipped by the Moerlein Company, one of the defendants in this case, some three car-loads I think, perhaps four or five. I refused to receive it; it was turned back. I signed an order stating I did not want to receive it. It went back to the Moerlein Brewing Co. I can't tell whether it went back to them. I did not receive it.

With reference to these two inventories of the goods, I could not compare the values on them because the prices named in the inventories were on different bases. The prices in the first inventory were on the cost of the goods and probably some freight added. I am not sure of that. That is my impression. The prices on the second inventory were the selling prices at the time. I could not compare them under these circumstances. At the sale by the marshal, Mr. Lovejoy represented the Moerlein Brewing Co. I heard the name of the Moerlein Brewing Co. called out by the auctioneer as the highest bidder on several lots, also the name of Teuscher &

Co. I collected the $20,000 bills receivable which I received from Seinsheimer, at least those which I could collect; treated them as part of the assets of the trust. Prior to December 23rd, 1892, I had a conference with some of the creditors named in the deed of trust of December 16th, 1892. There were present Mr. Kempner,
194 Mr. Adoue, Mr. Lasker. Mr. Kempner was at the time president of the Island City savings bank and represented its claim against Freiberg, Klein & Co. in that deed of trust. Mr. Lasker acted at the conference for the Citizens' Loan Co. and the First National bank. I notified all the preferred creditors by letter to meet me in this conference. I think the conference took place on the Tuesday following my assumption of the trust. It may have been Monday evening. It was undoubtedly prior to the seizure by the marshal under Moerlein's attachment. Mr. Fellman was also present at that conference representing the Irving National Bank of New York. There may have been more present, but I do not remember right now. The occasion of the conference was that I was in some doubt as to my authority under the deed of trust to sell goods on a credit. One of the drummers was in and was going to leave and I gave him his instructions on that evening and I came right across that question. I could not answer it to myself. I had to instruct the man whether he should sell on a credit or for cash only and I told him "You had better wait until tomorrow evening." I wanted to know the pleasure of the beneficiaries under that trust and the pleasure of all parties concerned in it about my selling on credit. That was why I convened them and laid the matter before them. It was discussed by all of those present. They expressed their views and wishes unanimously. They instructed me to use my best judgment and to sell on a credit and be careful, and Mr. Lasker said that he would advise me in any case where I had doubts. He had a great deal of experience. That was the only matter that came up for consideration at the meeting. Previous to this I had conferred with several of the creditors named in the deed of trust with reference to my administration, among others, with Mr. Lowenstein, the son of Mrs. Lowenstein. He asked me the next day after I went in there what I thought, whether his mother was all right in that thing, and I told him I was satisfied she was all right. He said he was satisfied; he thought it was all right. He did not say anything; he thought it was all right. I thought there was no question about her being safe. He was satisfied. He said "All right." I also conferred with Mr. Ben. Bear,
195 who represented, as he told me George Ketch, one of the beneficiaries. He asked me about Ketch's claim under the deed of trust; whether I thought it was all right. I told him I had no doubt Mr. Ketch would be paid. I said I considered he was perfectly safe. He said that was all right; something like that; I cannot remember the exact words, but he left me satisfied with the information I gave him. I had a conference with Mr. Lasker before the meeting above referred to with reference to the deed of trust. I cannot recall the words that were said. He was not interested in it in his individual capacity. I would not have talked to

him if he had been an outsider. I cannot recall exactly what we talked about. It had reference to the deed of trust. I cannot recall the particular points. It occurred almost three years ago and I cannot exactly remember it. With reference to these parties I have only spoken of what came within my personal knowledge. What others may have done to indicate their views I do not know. Mr. Adoue is a member of the firm of Adoue & Lobit, one of the beneficiaries under the deed of trust. I have detailed everything I can recall about the conference with those creditors. I cannot undertake to reproduce the exact language used by each party. I knew the opinions expressed by nearly everybody there, but I cannot reproduce everything of what they said except the conclusion that was arrived at that I should sell on a credit and use my best judgment, which was unanimous. Mr. Adoue was satisfied as to my selling on a credit; all of them were and agreed to it. I think I remember now that Mr. Adoue, or somebody else, I do not know which; somebody made the remark that those at the end of the deed of trust were the most interested in that discussion, for there would probably be enough for those at the head of the deed of trust to be paid anyhow, even if sales had been made injudiciously; that there were enough assets to cover those first named in the deed of trust, and he thought that the parties named at the tail end were the ones most interested in that question. I think that was what was stated. The last-named creditor on that list was the Irving National Bank of New York. They were represented at the meeting by Mr. Fellman, and he was perfectly satisfied and assented to the selling on a credit. I think the matter was referred espe-
196 cially to the Irving National bank through Mr. Fellman, its representative, in consequence of Mr. Adoue's suggestion, or whoever made the suggestion. I think that idea prevailed The final decision as to whether the sales should be made on credit or not was left to the parties last down on the list. The others were willing if the last ones were, and thereupon Mr. Fellman agreed to it. The matter was referred to Mr. Fellman right there at the meeting as the representative of the Irving National bank. This was on the Monday or Tuesday following the date of the deed of trust, and before the seizure. None of the creditors named in the deed of trust repudiated it or refused to accept under it. I do not remember whether or not I ever discussed the amount of compensation of any employé prior to the seizure with any of the creditors named in the deed of trust. I do not remember that.

Cross-examined, witness testified:

With reference to Kempner and Eckford, this letter from Kempner to Eckford, dated May 10, 1893, (as set out above), was sent to me through the mails from Dallas. It was once in my possession. It was the first information I had of the facts to which it relates. I did not understand that I had any connection with the matter, and that is why I did not pay any attention to it. I did not know what business Kempner had with Eckford, and I did not know myself

what business I had with Eckford. I got this letter through the mail addressed to me.

(At request of defendants' counsel witness read from his cash account.)

"Paid Kahn $1,498.60 and interest $46.87, together $1,645.47." The next item I paid at that time was $50 attorneys' fees. Next was Fly, $3,913.91. I paid Klein $50. Paid rent of the warehouse for December, $35, and J. Seinsheimer, on account of salary, $150. That is all on that page under date of the 9th. I paid Scott, Levi & Smith frequently. I paid them on January 13th, $500, rent of warehouse for December, $35; rent due on store by way of taxes, $294.38. Three days prior to that is an item to the Island City savings bank of $4,930 and another one of $5,434.92 to the same party, the Island City savings bank, but there are a great many
197 before that. I think those payments to the Island City savings bank are in the ledger of Freiberg, Klein & Co. under the head of bills payable. You can look through and see. It will appear in the cash book if they kept their books regularly. I have the ledger of Freiberg, Klein & Co. here. The Island City savings bank is carried forward to their ledger and posted there. I only looked at two items, but I saw from the general appearance that everything is posted, duplicated from my books. When I had my conference with Mr. Fellman on the Monday preceding the execution of the deed of trust, I understood from him at that time that parties were to be secured on whose paper Fellman was. That is, who held paper that he was endorser on and others. He did not tell me anything, but I understood same. I understood those parties and perhaps other creditors. He did not detail it to me. He did not tell me that he was endorser for these debts, I understood that he was endorser for a very large amount. He was their creditor, I understood that. My impression from what he said was that he was on a greater part of the indebtedness of Freiberg, Klein & Co. He was talking about Freiberg, Klein & Co., with reference to the trust deed to be made, the amount of their indebtedness and of their assets was not discussed between Fellman and me. As to who the creditors were, what particular names they bore or what they owed was not mentioned at the time. Nothing had been written and I knew nothing of their assets or liabilities. When I accepted the deed of trust I did not know what assets they had, whether they had whisky or cigars there. There was no inventory attached to the paper. The amount of value I did not know—had no idea. The information about their liabilities was confined to the parties named in the trust deed and amount. This I learned after I accepted the deed of trust itself. I got all my information from that at the time. I am interested in the Citizens' Loan Company, and in the First National and Island City savings bank also by reason of the Citizens' Loan Company owning a controlling interest in these last two institutions. I paid nothing to the Citizens' Loan Company, paid the Island City savings bank and some to the First National.

I have paid Fly's debt and Kahn's debt, the debt of the Island
198 City savings bank and $12,500 of the debt to the First National. The principal of the amount so paid by me aggregated $47,512.51. Of the assets turned over to me, my recollection is that I collected about $70,000. I cannot commit myself to that figure but it is about $73,000, not much more and not much less. I did not pay the balance of the debt of the First National because of some suits pending in this court, by which I might possibly become liable to other parties, and one or two suits pending in the district court of the same nature—sequestration suits. I wished to guard myself and retain funds to pay possible expenses of those suits and other expenses of the administration, not thinking there would be much more, if any money coming in from the collection of debts. I do not know anything about part of the debt being due to that bank by the endorsers on the paper of Freiberg, Klein & Co. I am only interested in the bank as a stockholder of the Citizens' Loan Company, which owns a controlling interest in it. Freiberg, Klein & Co., so far as I know, are still indebted to the bank to the extent of the difference between their debt and the amount I paid them.

(Counsel for defendant asked witness the following question—"Is there any debt existing to the Citizens' Loan Company, any part of this debt here named as secured by the trust deed due to the Citizens' Loan Company by Freiberg, Klein & Co. or anybody else?")

(Plaintiff's counsel objected to the question and the answer thereto as irrelevant under the issues made by the pleadings in this case.)

(The court overruled the objection, permitted the question be asked, and the answer thereto to be given to the jury.)

(To this ruling of the court the counsel for the plaintiff then and there *accepted* and still *accepts*.)

(Exception No. 5.)

Witness answered—"I think the debt has been subrogated. As far as I know the debt still exists. As far as I am connected with it, I have not paid it as trustee. I have no knowledge that Fellman & Grumbach have paid it. I am familiar with the business of the
199 Citizens' Loan Company. If the debt exists today, it is a considerable amount. I do not know of any of the other outstandings of the Citizens' Loan Company. Fellman told me he was subrogated to the Citizens' Loan Company claim. I understand that subrogation means that instead of the Citizens' Loan Company holding the debt he holds it. I do not know how he became subrogated. I do not know that they made him a present of the debt. I do not know anything about it except that Fellman said to me he was subrogated to the rights of the Citizens' Loan Company against Freiberg, Klein & Co. The books of Freiberg, Klein & Co. ought to show that their bills payable to their various creditors were endorsed, if such was the fact. As far as I paid the national bank debt and got possession of the notes they were endorsed by Fellman & Grumbach. I do not know that Freiberg,

Klein & Co.'s books show the endorsements. If I owed money my books would reflect it. They would merely show that I owed those people money and whether by note or otherwise. Would not show in the entry if there were endorsements on such notes. I would keep a memorandum of the endorsements.

Neither Fellman nor anybody else ever told me that he had paid any of these notes. Fellman told me and in that way I know that he, and Fellman and Grumbach had become subrogated to the claims of the Citizens' Loan Company and the American National Bank claims, and the claims of Mr. Ketch and Mrs. Lowenstein. He said nothing about the First National bank. I paid the First National bank various sums lately. They turned me over the notes, gave me receipts for part payments when I made them. I have no other reason to believe that anybody has been subrogated besides them. In November, 1894, I paid the money in full for one note and was handed the note receipted with Fellman & Grumback's endorsements thereon. I have made partial payments on another note for which they, the bank, gave me their receipt. I still owe them $12,500 of their indebtedness. The Citizens' Loan Co. is a corporation. I never was an officer of said corporation. I have read their semi-annual statements. I have never seen their charter, but am satisfied they have one, I do not know in what form it is, whether under general or special law. Think it
200 was organized as far back as 1874. Can't recollect exactly. It is more than ten years ago. I do not know whether it was as much as twenty years ago.

(It was thereupon admitted by counsel for all parties that the Citizens' Loan Co. was incorporated under the "general incorporation act" and not a special act of the legislature.)

The Island City savings bank is incorporated by special act (which was also admitted by counsel for all parties as also the fact that the First National Bank of Galveston is a national banking association under the laws of Congress).

M. LASKER, witness for plaintiff, testified:

I live in Galveston. Have lived here for a great many years. I was director of the Citizens' Loan Co. in 1892. Had been director many years. Don't know how many exactly. Was chairman of the finance committee ever since I was director. Am president of it now. If I was not president then in 1892, I was director and chairman of the finance committee. The Citizens' Loan Co. was a creditor of Freiberg, Klein & Co. at the time of their failure. I first learned of the failure by seeing it in the morning paper on the morning following the date of the trust deed. Did not know that the failure was imminent or impending. After the failure I learned of the deed of trust in which the Citizens' Loan Co. was preferred as a creditor. At that time I was vice-president, director and chairman of the finance committee of the First National Bank of Galveston.

(It was admitted by counsel for all parties that the indebtedness of Freiberg, Klein & Co. to the Citizens' Loan Co. and the Island City savings bank and the First National bank was accurately and correctly stated in the deed of trust to Sonnentheil of date December 16th, 1892.)

My duties in the First National bank were to pass on all credits and as I deemed it best at the time with or without consultation with other members of the finance committee. That was my chief duty and function as chairman of the finance committee. The directors met every Tuesday, then and before and since. For ten or twelve years at that time and for fifteen years now, I
201 have passed on the credits of the bank. Within the fifteen years I have been there, not a single act of mine in that capacity has been repudiated by the directors, or my authority in that respect questioned in any way. It has been my custom to look after debtors of the bank failing to pay their debts at maturity, or who became insolvent before the maturity of their indebtedness. This has been my custom ever since I have been chairman of the finance committee and the recognized custom of the bank that I should do so. I occupied the same relation and exercised the same functions at the date of Freiberg, Klein & Co.'s failure. I always attended to the securities taken by the bank for debts due to it. If I thought necessary I would consult with the others. The First National bank accepted the security provided for it in the deed of trust made by Freiberg, Klein & Co. to Sonnentheil, December 16th, 1892. After I saw mention of it in the paper the next information I had was from Mr. Sonnentheil, who came to me and told me of it. I did not accept in terms, did not say the words "I accept." I did not see any occasion for that. I treated it as a benefit that was extended to me and it was my province then to deal with it. When I say me, I mean the First National bank. I was acting for the First National bank. I represented, I think, a large portion of the whole indebtedness secured in the deed of trust, viz., the Citizens' Loan Co., the Island City savings bank and the First National Bank of Galveston. Sonnentheil came to me and flatteringly remarked that he had great confidence in my experience and would like to consult with me, and also with the other creditors as to what would best be done next. First, as regards the employment of the former owners, Freiberg, Klein & Seinsheimer, etc., and I gave him my advice on those matters. I advised him to have a meeting of the different parties in interest, etc. I did what I thought was best at the time in reference to the matter. He spoke to me as the representative of the creditors above named, the Citizens' Loan Co., the Island City savings bank and the First National bank, said to me that he thought I had as much experience in the matters as the other beneficiaries and he came to me first. I very often
202 talked with him relative to the matter; can't remember each time or place; almost daily he came to me with something or other, but the most notable must have been the very next day after that, that is, after he had come to me and stated, I being the

representative of the three institutions, what I have already related. On the next day he arranged for a meeting, of which meeting he said he had given already notice, but my recollection is of the creditors there was no one there but myself, Mr. Kempner and Mr. Adoue. Kempner asked me to speak for the Island City savings bank, and it was the understood agreement of both of the other institutions that I represented them and that was the meeting at which we next discussed the matter. Kempner was not present. He was president of the Island City saving bank and first told me about the arrangement. He seemed to have known of the arrangement before I did; that is, the deed of trust and that meeting which he called me to attend for the Island City. He himself was busy. He seemed to understand the situation when I first heard of it, and I took it from what he told me. I think Adoue, Sonnentheil and Mr. Levi, of Scott, Levi & Smith, were present at this meeting about the day after the failure was mentioned in the papers, probably the third day after it. I do not think it was Sunday, but do not remember. It was before the attachment by Moerlein & Co. of the stock of goods. The main thing discussed at that meeting was whether or not Sonnentheil should sell goods otherwise than for cash. Every one present took part in the discussion, including myself. I was there representing the Island City savings bank, the First National bank and the Citizens' Loan Co. and I carried on the conversation in such a manner that Sonnentheil must have been justified in believing that I was there representing these institutions as an accepting creditor under this deed of trust. That was what I was there for. Adoue and I agreed that it was best to sell on a credit and do certain other things, the retaining of the employees, including also Freiberg, Seinsheimer and Klein and some travelers. All these matters were discussed and we were unanimously of the opinion that for the present, considering the large amounts out in the country that had to be collected, etc., they had better sell where they could do it safely on a credit than to determine on cash
203 sales only. As far as we had the capacity of determining this question, it was determined at that meeting. I held exactly the same relation to the Citizens' Loan Co. with regard to their finances and securities as I did in the First National except this, that in the Citizens' Loan Co. no loan of any description or any size was ever made without first getting the approval of the other members of the finance committee in writing. Loans were generally upon real estate and were submitted to the finance committee and then to the building committee if upon real estate. The habit for years has been to submit them to me in the first instance, and where I could not manage it myself I would come back to consult with the others; otherwise I would report what I had done. My actions and authority in these matters for the Citizens' Loan Co. were never questioned during the six or seven years previous to the Freiberg, Klein & Co. failure and during which time I acted in the capacity stated for the Citizens' Loan Co. In the Island City savings bank my functions and habits were about the same, except that the president there participated more in the management of loans, etc., than

the First National bank. In the First National every loan of large size has been submitted to me in the first place, even if the president was in the city. By common consent I have been considered as their expert on credits and as chairman of the finance committee, all new loans of any size were submitted to me in the first place. In the Island City they were in the first place submitted to its president and only when he desired to consult me did he do so. In the Citizens' Loan Co. loans were generally submitted to the finance committee first, but in making loans there we generally submitted them to the whole finance committee before the loans were made. When it came to a matter of securing debts in the Island City savings bank, somehow or other it always fell to my province to attend to it in every instance since I have been with the bank, but I understood that Mr. Kempner had first accepted for the Island City savings bank the Freiberg, Klein & Co. deed of trust and it was only at the meeting referred to that he requested me to speak for him and for the bank, otherwise I would not have felt authorized to speak
204 at that meeting except at Kempner's request. It was his custom to attend to such matters in the first place. Kempner died in April, 1894. The only member of the firm of Freiberg, Klein & Co. that I ever spoke about this matter with is Freiberg. It was the same day I first learned of the deed of trust. He came to show me that he had dealt in good faith with these three institutions which I represented and done the best he could to protect them. I did not understand that it was a formal question as to whether I should accept or not, but from the conversation which occurred between us he had every reason to believe I had accepted and I had nothing else in my mind but that. That was the meaning I intended to convey. The indebtedness due to the three institutions which I represented was evidenced by notes indorsed by Fellman & Grumbach. They were evidently accommodation indorsements and Freiberg, Klein & Co. got the money. We knew the paper was what in bank circles was called "accommodation paper" and the ordinary form of those papers.

I think the notes were payable to the order of the respective institutions or to their own, Freiberg, Klein & Co. They were drawn, perhaps, in different shapes, simply endorsed by them. I most assuredly concerned myself in behalf of the institutions I represented in the security that had been provided by the deed of trust, notwithstanding the endorsement, because I wanted to be sure we could get the money. Fellman & Grumbach were solvent, and I knew could help out for any margin that would be due, but at that time I did not know as it was afterwards developed, that they were on $140,000 of that paper in that paper and I knew they were amply solvent for a retail business and were considered a rich firm, yet if we were not secured through this deed of trust and they had to pay it all I would not have felt so comfortable about it. This was obvious, of course. We manifested our anxiety to get our money for these institutions out of the estate in Sonnentheil's hands. There were various meetings of parties interested as to what was best to be done with regard to it to get the money out as well as possible, and so

forth, for the margin between the amount of the debts and what the trust funds would pay I was content to rely on the en-
205 dorsement. I did not know whether the trust funds would pay in full or not, but if I had to rely on the endorsement for the total payment of our debt, including all the balance, I knew to be endorsed, I would not have felt comfortable at all. None of these institutions that I know of repudiated or rejected the securities provided in that deed of trust to Sonnentheil. I do not remember, but the First National bank on the Tuesday following the failure of Freiberg, Klein & Co., must have had a meeting as was their custom. If we missed it it was because we had not a quorum present. The directors are all business men who meet daily and without having any definite recollection I have do doubt each director was told by me of what I had done in the matter, as we met. The amount involved was very large for our bank. The failure of Freiberg, Klein & Co. was notorious in Galveston just a- such as matter would be. I led all of the directors to believe that we were entirely safe and would not lose a dollar between the deed of trust and the endorsement we had on notes, between the two there was no question but that we were covered beyond peradventure.

Cross-examined, witness testified:

The authority exercised by me for these corporations, I claimed under the functions of the office which I held and also by the charter and by-laws. I was under the impression that all that I did in all the corporations was within the limits of the charter and by-laws. I performed my duties as I understood them; that my authority had been conferred on me by common consent of the directors and was not inconsistent with the by-laws. I considered my authority and functions not inconsistent with the by-laws. That is as far as I could go. I considered my office as chairman of the finance committee made it my duty to act in all these matters as they came before me, and that it was indicated in some form by the charter and by-laws, though perhaps not imposed on me by them. I also relied on the previous sanction and custom of the board in all that I did in matters of like character.

It was with reference to this, as also to the sections of the by-laws as to the duties for my performance that I acted and assumed
206 the authority. It is hard to say what I had on my mind. I acted as I felt I ought to act under the circumstances. I did not define in my mind technical terms. Instead I felt that I was doing my duty as it devolved upon me at that time and as I was expected to do and I had always been in the habit of doing, and I felt I was doing it right and did not define it in my mind. I had no other reason for doing than that it was expected of me to do it—I was in the place. Had done such things before, which were sanctioned by the company. That was all the authority I suppose I was exercising. I did not then, nor do I now think that the authority was in conflict with the by-laws or the charter. I did it because I thought it was right in my position and I found nothing that suggested to me that it was wrong. My habit pointed it

out to me as a thing competent and proper to be done in my official relation to these companies and that was all. The debt of the Citizens' Loan Co. was paid. I do not know whether Fellman & Grumbach paid it or the assignee or trustee. I did not have anything to do with that at the time unless my particular attention was called to it. The Citizens' Loan Co. debt is paid—they have no longer any claim in the matter. I may have spoken to other creditors in the manner that I spoke of our security to the directors of the bank, and I may not. I do not know. If I spoke to others it was not in the morning. My communication to the institutions I represented was in the nature of a report to them—what I deemed the status to be, because I was interested in the matter. My communication to others was different. As the lawyers say the mere answering of a question with reference to law that they are not paid for they do not hold themselves responsible for it, and it was with that same distinction that I spoke to others if I spoke at all. I was responsible to my codirectors but would not mislead any one. The First National bank has no longer any claim against Freiberg, Klein & Co. I do not know that it is part of my function to know who paid the balance that Sonnentheil did not pay. I know that Sonnentheil paid part of it and part of it was arranged by Fellman & Grumbach. I do not think that Freiberg, Klein & Co. owe that bank anything.

207 Re-examined for plaintiff, witness testified:

Freiberg, Klein & Co. owed the debt at the date the deed of trust was made to the bank. I do not know where the notes are that the First National bank originally held. They remained after the bank received its money for some time in the bank for collection. I do not know the particulars. I know the only thing we got in cash was what Sonnentheil paid us. Afterwards I know there were some other notes substituted for those. Just how the matter was arranged I do not know. I did not charge my mind with it. I think in lieu of the Freiberg, Klein & Co. note the bank got Kempner's notes and Fellman's notes. I think I had one of the other notes Mr. Fellman indorsed. I know we no longer have the ownership of those notes. I do not know that we hold them as collateral. We did at the time, but I do not know about it now. I do not think so now. I wish to make a correction of my testimony regarding the conference of creditors concerning which I testified. My memory has been refreshed with regard to that meeting. I said there was no one present but Adoue, myself and Sonnentheil. I have now to say that Mr. Fellman was also at that meeting, and in the next place I told you that Mr. Kempner asked me to represent him at that meeting. We had a subsequent meeting growing out of that meeting, a meeting at the Island City savings bank, a meeting at which Mr. Kempner was present on the following Monday and substantially the same subjects were repeated there with the same result as at the meeting in the office of Scott, Levi & Smith. That was the morning following the failure.

A. W. FLY, witness for plaintiff, testified:

I reside in Galveston. Am a physician. Am also mayor of the city of Galveston. Have been since June, 1893. Have been twice elected; remember the failure of Freiberg, Klein & Co. At that time they owed me as temporary administrator of the Raines estate, and I had a claim against them in that capacity of about $3,900. The original claim was $5,656.23. The difference was paid out by Freiberg, Klein & Co. on order from the administrator, leaving a balance due me at the time of $3,918.13 as stated in the deed
208 of trust. I had no security for that money. Seinsheimer and Freiberg were bondsmen on my official bond as administrator. When the heirs wanted me to act in that capacity, I told Seinsheimer that if he would make the bond and keep the cash and make the payments upon vouchers or orders I would accept it; otherwise, not. I was not hunting up bondsmen; there was nothing in it to me. Only an accommodation to those people, and Seinsheimer did so. I deposited the funds with them. I was named in the deed of trust to Sonnentheil as one of the beneficiaries, named in there as the first on the list. The evening the deed of trust was made I heard some little rumor that the failure was contemplated. Some one mentioned it on the street. I do not remember. That night at ten o'clock Seinsheimer telephoned me himself; said they had failed. They had put me on the list of preferred creditors and headed the list with me, and I told him I knew it would be all right; I never gave it a moment's thought; I told him that it was all right; I had not concerned myself about it. I was practicing medicine. I saw Seinsheimer next day. He mentioned the fact again as he had telephoned me. I said it was all right. I was paid by Sonnentheil the full amount of the claim. I never repudiated the deed of trust nor the money which Sonnentheil offered me.

B. ADOUE, witness for plaintiff, testified:

I live in Galveston, and have lived here twenty years. Am a member of the firm of Adoue & Lobit. J. Lobit and myself compose the firm. We are principally in the banking business and have been ever since we were in Galveston. We were creditors of the firm of Freiberg, Klein & Co. when they failed, to the extent of $15,000. We had three notes of $5,000 each, two of them secured or endorsed by Fellman & Grumbach, and another one not endorsed. We had no other collateral for the other. We simply had straight paper for $5,000 and paper for $10,000, endorsed by Fellman & Grumbach. Freiberg, Klein & Co. got the money on those notes. They were accommodation paper. The first notice I got of their failure was in the Galveston News the next morning. The assignee, Sonnentheil, came to our office in the morning before 12 o'clock and
209 told me that we were one of the secured creditors in the trust deed, and he would expect me to give him my assistance in the management of the business. I said I would, and for that purpose he said he would call a meeting later on. That was my notice of the failure. I answered him in a few words. Can't exactly re-

call them. I said it was all right; very glad he was assignee; hoped we would get our money back. I attended two or three meetings. One the same day, one two or three days after that. We had two or three meetings, some of them informal. They did not amount to much. One meeting, it must have been two or three days, not exceeding that, after the failure, in which we discussed the policy that would be best for disposing of the business and getting our money out of it, not more — three days after the failure, I think it was the day after. Sonnentheil was present, Mr. Lasker, Mr. Fellman and Mr. Grumbach came in after the meeting was pretty well on, and I believe Mr. Levi, of Scott, Levi & Smith, was present. I believe it was in the office of Scott, Levi & Smith. The principal matter considered was the best method of realizing on the assets of the trust. The discussion was full, and the different parties were asked their opinion. Mr. Sonnentheil finally asked the question if it was best to sell the goods on credit or sell them for cash, as a whole. We settled that point in favor of continuing the business as it was, as we considered that character of business, a good deal in bar-rooms, there would be a great loss unless business was kept going and we thought it best to keep the business going on as it was. This meeting was two or three days before the seizure of the goods by the marshal.

I did more than indicate my acceptance of the security that was given me by the deed of trust. We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it, that was my idea. We have not got our money yet, none of it.

Cross-examined, the witness testified:

The debt due Adoue & Lobit as mentioned in the deed of trust to Sonnentheil is in the same form as it was originally given us by Freiberg, Klein & Co. We still have the three original notes, two of which were endorsed by Fellman & Grumbach. We have never protested or presented them for payment to Fellman & Grumbach nor realized on them, nor asked for payment on them. We first wanted to see what the assignee would do. We tried to get it out of him if we could. Every time I see him I ask him as to the prospect of getting our money. He kept me posted as to the payment he was making. Our account was not reached. He has paid everything up to our account. That was my information. We could never get anything. The accounts were paid in the order as they were inserted in the deed of trust. It was my confidence of collecting our money from the trustee, Sonnentheil, that caused me not to present our debt to Fellman & Grumbach. I always believed we would get our money out of the assignee. I got that belief from the information the assignee gave me and also from the case in court. I have no doubt the defendants will lose it. I have no doubt about this. I have had other cases in court.

J. Lobit, witness for plaintiff, testified:

I am a member of the firm of Adoue & Lobit. Reside and have resided for twenty-odd years in Galveston. My firm was a creditor

of Freiberg, Klein & Co. when they failed to the amount of $15,000, evidenced by notes, which I exhibit here in court. Two of them are for $5,000 each, and two for $2,500 each, the $5,000 notes are indorsed by Fellman & Grumbach. Freiberg, Klein & Co. got the money on them.

(The notes were read in evidence. They are as follows:)

"$5,000.00. GALVESTON, TEXAS, *December 8th*, 1892.

Four (4) months after date we promise to pay to the order of ourselves five thousand dollars ($5,000.00). Value received.

(Signed) FREIBERG, KLEIN & CO.

Due April 11th, 1893.

(Indorsed:) Freiberg, Klein & Co., Fellman & Grumbach."

211 "$5,000.00. GALVESTON, TEXAS, *October 22d*, '92.

Four (4) months after date we promise to pay to the order of ourselves five thousand dollars ($5,000.00), at Galveston, Texas. Value received.

(Signed) FREIBERG, KLEIN & CO.

Due February 25th.

(Indorsed:) Freiberg, Klein & Co. Fellman & Grumbach."

"$2,500.00. GALVESTON, TEXAS, *December 3d*, 1892.

Ten (10) days after date we promise to pay to the order of Adoue & Lobit twenty-five hundred dollars ($2,500) at Galveston, Texas. Value received.

(Signed) FREIBERG, KLEIN & CO.

Due December 16th."

"$2,500.00. GALVESTON, TEXAS, *Dec. 3rd*, 1892.

Fifteen days after date we promise to pay to the order of Adoue & Lobit twenty-five hundred dollars ($2,500) at Galveston, Texas. Value received.

(Signed) FREIBERG, KLEIN & CO.

Due December 21st."

Freiberg, Klein & Co. got the money from my bank on all of this paper. I first learned of their failure when I saw mention of it in the "Galveston News" on the following day. Did not know that the failure was imminent or impending. Knew nothing of that. The $5,000 we loaned them on December 3rd was thirteen days before the failure. When I learned of the failure I also learned that the notes which we held were secured by the deed of trust. This I learned also from the newspaper. I also talked with Mose Freiberg a few days after the deed of trust was made. He regretted the failure and was sorry. I told him I was satisfied, inasmuch as they had protected us in the deed of trust and

that I supposed that they had done the best they could and we were satisfied with it. We have never presented the notes. These are the original notes. We have not renewed them. Have never sued on them because we relied on the deed of trust and on being secured thereby. Have been in the banking business a great
212 many years, and am familiar with notes and commercial law relating to them. Did not think much about the reliability of Fellman & Grumbach, because I was confident of collecting the notes from the deed of trust, being secured thereby. Have never taken any waiver of protest from Fellman & Grumbach, nor any collaterals from them—nothing. Have taken no steps at all about collecting these notes, depending altogether on the deed of trust. It was not more than two or three days after the failure that I was talking to Mr. Freiberg as stated. It may have been the second day after.

JOHN N. WHALEN, witness for plaintiff, testified:

I was deputy U. S. marshal on December 23, 1892, deputy of J. J. Dickerson, marshal of the eastern district of Texas. I levied the writ of attachment in the suit of The Moerlein Brewing Co. *vs.* Freiberg, Klein & Co. upon the personal property in the hands of Mr. Sonnentheil pointed out to me by Mr. Werner, agent of the Moerlein Brewing Company. I made the levy under his direction. Sonnentheil protested and asked me to wait a few minutes until he could consult with his attorneys. I told him I would. He telephoned Mr. Scott, who came down there and said the goods did not belong to Freiberg, Klein & Co. and asked to look at the bond and writ of attachment which I had. He read them and gave me the usual warning. Notwithstanding this I levied. Mr. Werner was present I believe when I made the levy.

(It was admitted by counsel for all parties that Werner, the agent of the Moerlein Brewing Co., made the affidavit for attachment under which the writ was issued and levied upon the property mentioned in Exhibit "A" to plaintiff's petition.)

Cross-examined, witness testified:

I made every exertion by advertising and by Mr. Lovejoy getting out a lot of circulars for me and distributing them through the country to notify people of the sale of said goods and induce buyers to come and bid. Advertisement was for ten days in the "Galveston News" also by circulars sent to merchants and other people, to best of my knowledge. Sale was pretty largely attended the last few days, and an unusual number of interior people from Waco, Hous-
213 ton and other towns along the line, Palestine, Austin and Navasota, various points throughout the interior on the lines of railroad attended the sale. There was pretty fair competition at the sale. The goods were put in the best possible shape to make effective and intelligent sales. Had been put in lots; sold in one-barrel lots or one-case lots, as preferred, or five. When a person bought they knew exactly what they were buying, the quality, such as liquor, brands, and what they were worth. Spring liquor was

worth more than fall liquor, and I would make them pay the difference. All were informed as to the character of goods sold and the extent of the lots they were buying, and so arranged in the warehouse so as to be inspected for several days before the sale, by such as wished to look at the brands and things of that kind. No packages were broken. I had nothing on tap. Mr. Werner and Mr. Lovejoy were present, representing the Moerlein Brewing Company. The Moerlein Brewing Company bought all of the beer that was down there, the wagons and everything that was connected with their line of business, and I think they bought other goods. Lovejoy bought only the beer, wagons, teams and empty bottles and a lot of cash registers, about eighteen or twenty. There were two sales of goods, the first on February 3, 1893, and the three succeeding days thereafter, and the second sale about ten days afterwards. There were a lot of goods marked which we took the wrong brand of, and the people refused to take it, and we had a second sale for them. This second sale was advertised. It amounted to something like $900, a mere fragrant of the entirety.

(Plaintiff read in evidence the file-mark of the present suit, January 25, 1893, the date of the service of citation in this cause on the Christian Moerlein Brewing Company, February 3, 1893, and on the defendant, J. J. Dickerson, February 28, 1893.)

M. MARX, witness for plaintiff, testified:

I live in Galveston; have lived there a great many years; am a member of the firm of Marx & Blum; was in Galveston at the date of the failure of Freiberg, Klein & Co., December 16, 1892.

214 I know S. A. Walker; he was a creditor of Freiberg, Klein & Co. for $15,000. I made the transaction by which Walker became a creditor of Freiberg, Klein & Co. I made it for Walker. He came here from St. Jo, Mo., with a letter of introduction to me, told me he had $200,000 he wanted to place, his bank had a surplus of money that they could not use, and he wished to place $200,000 or more, if he could. I assisted him in placing about $100,000. This $15,000 was part of that. I interested myself in the matter for him after the failure. I learned of it next morning after it occurred. Did not know of it before. I talked to Fellman about the deed of trust. He was endorser of Walker's paper, did not talk particularly to any member of the firm of Freiberg, Klein & Co. I accepted under the deed of trust, probably the next day, I think to Joe Seinsheimer. I assented to the deed of trust securing Walker. I was authorized to do so for Walker.

Cross-examined, witness testified:

Walker at that time was in St. Jo, Mo. I saw Seinsheimer within a day or two, perhaps the day after the failure. I had telegraphic authority from Walker. I might have kept that telegram. I do not keep all documents of that kind. I suppose they could be gotten at the telegraph office, if I have not got it now. I may not be able to find it. It has been two or three years ago. Walker comes here very frequently now. I telegraphed Walker the circumstance as

far as I remember, of the failure. That is that they had failed. He replied to me by telegram that he looked to me to protect his claim. Fellman & Grumbach, one or both, may have been endorsers on the Walker notes, that is Fellman or his firm. I do not think I released Fellman from his endorsement when I accepted the assignment that I speak of. I am pretty certain that I did not intend to do so. I did not release Fellman & Grumbach or Fellman. I did look to them as the last resort. The debt has been paid. I got the money. I can't remember, to save my life, when it was. I could not tell you within ten months or a year, I know I got it. Somebody paid it. There is no debt to Walker from Freiberg, Klein & Co.

215 Re-examined by plaintiff, witness said:

I do not know who paid it. I got the money. I do not remember positively. I got it, I think from the receiver. I do not know. I know I got the money; that ended it. I was out for the money and did not care what medium it came to me through.

Here plaintiff rested his case.

Defendants offered and read in evidence the following documents:

CHARTER AND BY-LAWS OF THE CITIZENS' LOAN CO. OF GALVESTON, TEXAS.

*Charter.*

SECTION I.

Under and by authority of an act of the legislature of the State of Texas, entitled "An act concerning private corporations," approved April 23, 1874. Chapter XCVII General Laws of Texas. We, the undersigned, for ourselves, our associates, successors and assigns do hereby form ourselves into a corporation for the purposes and objects hereinafter named.

SECTION II—*Name.*

The name of the corporation shall be "Citizens' Loan Company."

SECTION III—*Place of Business.*

The place of business of the corporation shall be and remain in the city and county of Galveston.

SECTION IV—*Term of Existence.*

This corporation shall exist for the term of fifty years.

SECTION V—*Purpose of Formation.*

This corporation is formed for the purpose of aiding its members in acquiring, holding, and improving real estate in the city
216 and county of Galveston; of holding, purchasing, improving, mortgaging, selling or otherwise conveying any, real,

personal, or mixed property, in the city and country of Galveston; of lending its funds on real, personal or mixed property in the city or county of Galveston.

SECTION VI—*Directors.*

The corporate powers of this company shall be managed by a board of nine directors, who shall be stockholders. The following-named persons, to wit:

| | | |
|---|---|---|
| Albert Weis, | L. C. Michael, | Charles Vidor, |
| J. H. Ruhl, | M. Strickland, | J. D. Skinner, |
| M. Freiberg, | R. J. Hughes, | C. E. Richards. |

All of whom are residents of the city and county of Galveston, are appointed directors for the first year, and shall hold their offices until their successors have been elected and have qualified, as provided by the by-laws of this corporation.

The directors shall not receive any compensation for their services

SECTION VII—*Capital Stock.*

The capital stock of this corporation shall be ($300,000) three hundred thousand dollars which shall be divided into shares of ($300) three hundred dollars each.

The stock shall be paid in monthly installments of five dollars per share. Should any stockholder fail to pay the monthly installments due on any share of stock at the time fixed by the by-laws of this company a penalty of ten per cent. of the installment due, shall be charged in addition against such delinquent stockholder. Should the monthly installment with the 10 per cent. added be unpaid when the next monthly installment becomes due, and that likewise be unpaid, then another penalty of 10 per cent. shall be added to the whole amount due this company, and so on each following month that it remains unpaid, until the dues and penalties in arrears shall amount to as much as has been paid on said share of stock, when the same shall, by the board of directors, be declared forfeited, and shall be disposed of by the board of directors for the benefit of the corporation.

217 Each share of the stock of (300) three hundred dollars, shall, when fully paid up, be divided into three shares of $100 each.

Whenever one-third of the capital stock of this corporation has been subscribed for, the company shall be authorized to organize and do business.

SECTION V-II—*By-laws.*

The directors shall, as authorized by law, make the by-laws for this corporation, provided that any number of persons owning one-fourth of the subscribed shares of stock, may call a stockholders' meeting for the purpose of changing the by-laws made by the board of directors.

SECTION IX—*Amendment.*

This charter can be amended with the consent of the stockholders owning two-thirds of the subscribed capital stock.

In testimony whereof, we, hereunto set our hands, this 26th day of April, A. D. 1879, at Galveston, Texas.

(Signed) CHAS. E. RICHARDS.
ALBERT WEIS.
LOUIS C. MICHEL.
CHAS. VIDOR.
J. H. RUHL.
M. STRICKLAND.
J. D. SKINNER.
MOSES FREIBERG.
R. J. HUGHES.

THE STATE OF TEXAS, }
*County of Galveston.* }

Before me, I. Lovenberg, a notary public in and for said county of Galveston, duly commissioned and qualified, personally came, this day, Albert Weis, L. C. Michael, Charles Vidor, J. H. Ruhl, M. Strickland, J. D. Skinner, Moses Freiberg, R. J. Hughes and Charles E. Richards, all to me well known to be the persons described in, and who executed the foregoing and annexed instrument of
218 writing, and severally acknowledged that they had executed said instrument for the purpose and considerations therein expressed.

To certify which I hereto sign my name and affix my official seal, at my office in Galveston, Texas, this twenty-ninth day of April, A. D. 1879.

(Signed) I. LOVENBERG,
*Notary Public, Galveston County, Texas.*

Endorsed: Charter "Citizens' Loan Company." Filed in the department of state May 5, 1879. (Signed) John D. Templeton, secretary of state.

BY-LAWS OF THE CITIZENS' LOAN CO.

SECTION I—*Meetings of the Board of Directors.*

The board of directors shall meet on the third Tuesday in every month (at such hour as may be fixed by resolutions of the board) for the transaction of business. Five directors shall constitute a quorum, but a less number may adjourn to a stated time.

SECTION II—*The Board of Directors.*

No director of this company shall be taken as bondsman or security on any bond of this company. They shall have power by a two thirds vote to remove any officer for any dereliction of duty on his part. They shall designate a bank of deposit to receive the

company's moneys, and the secretary shall be required to deposit in said bank, in the name of the company, within twenty-four hours after being received by him; provided, that Sundays and legal holidays are not to be reckoned as part of the said twenty-four hours.

If a director absents himself from the meeting of the board for three successive stated meetings the board may declare his seat vacant. Whenever a vacancy occurs it shall be filled by the board of directors. No one elected as a director shall be deemed to have qualified until he has accepted the office, and his acceptance shall be all the qualification necessary.

219 SECTION III—*Standing Committees and Officers.*

The regular standing committees of the company shall be a committee of three on finance; a committee of three on real estate, and a committee of three on building. The officers of this corporation shall consist of nine directors, three auditors, an attorney and a secretary, who shall *ex officio* be treasurer. The directors shall elect a president and vice-president from their own number, and the attorney and secretary from the stockholders. The standing committees shall be appointed by the president from the board of directors. The directors and auditors shall be elected on the third Tuesday in April of each and every year by the stockholders of this corporation, and every officer so elected shall be a stockholder in the company. The first meeting of the stockholders having failed to elect auditors the president shall fill the vacancies by appointment of three shareholders not members of the board of directors. Whenever a vacancy occurs in the board of auditors the vacancy shall be filled by the board of auditors by election of a shareholder for the unexpired term.

SECTION IV—*The President.*

The president shall preside at all meetings of the board of directors when present at such meetings. He shall sign all drafts on the treasury; he shall sign all contracts to which the company is a party, and all conveyances of property belonging to the company; provided that all contracts and conveyances before receiving the president's signature shall have been approved by the appropriate committee and recorded with their proceedings. He shall have the power to call a meeting of the board of directors at any time, and it shall be his duty to call a meeting of the board whenever requested in writing by three directors. He shall appoint the standing committees. In case of a tie vote in the board of directors the president, or in his absence the vice-president, shall have the casting vote. He shall be *ex officio* a member of each and every committee.

220 SECTION V*I*—*The Vice-President.*

It shall be the duty of the vice-president to assist the president in the discharge of his duties, and in the absence of the president to act in his stead.

SECTION VI—*The Auditors.*

The auditors, or any of them, shall have access to all the books and papers of the company, and it shall be their duty to examine the books and papers of the company and make a report of their examination quarterly to the directory. They shall also be required to make a complete exhibit of the affairs of the company at the annual meeting of the stockholders and at such other times as the stockholders may require.

SECTION VII—*Real-estate Committee.*

It shall be the duty of the real-estate committee to appraise real estate and recommend or disapprove of the purchase or sale thereof or loans thereon by the company. All the real estate or other property purchased or sold by the company shall be done through the real-estate committee. The real-estate committee shall fix the amount of insurance on all property in which the company shall have interest by ownership, mortgage, or otherwise.

SECTION VIII—*The Building Committee.*

It shall be the duty of the building committee to superintend and direct all the building and repairing done by the company.

SECTION IX—*Finance Committee.*

It shall be the duty of the finance committee to pass on the validity of all claims against the company and to approve or disapprove the same, and none but approved accounts shall be paid. It shall be the duty of the finance committee to keep all the moneys of the company actively employed as in their judgment may seem
221 to the best interest of this company in loans upon unquestionable security, collaterals or real estate, provided that no loan shall be awarded on real estate until the real estate on which the same is awarded be appraised and the proposed loan approved by the real-estate committee.

SECTION X—*The Secretary.*

The secretary shall keep a record of all proceedings of the board of directors, which shall be read at the next succeeding meeting; he shall conduct all correspondence of the company; he shall keep all accounts that the interest of the company may require; he shall attest all orders drawn from the treasury for the payment of money, and shall attest and fix the seal of the company to all deeds and contracts in writing; he shall have in charge the seal of the company, and all the books and papers appertaining to his office, and he shall deliver them to his successor in office. He shall at each monthly meeting of the board of directors furnish a statement of the affairs of the company, together with a certificate of the bank in which the company makes deposit showing the amount of cash on hand to the company's credit. He shall follow the instructions

of the board of directors and keep them informed of all matters of interest to the company. He shall furnish on election day, for the use of the inspectors of election, a list of all stockholders entitled to vote, with the number of shares held by each. He may attend to such business as shall not interfere with his duties as secretary of this company. He shall call special meetings at any time when ordered by the president or in his absence by the vice-president, or three directors. He shall receive such annual salary as the board may fix, payable monthly; and for the performance of his duties shall give bond, to be approved by the board, in the sum of five thousand dollars or such additional amounts as the board may from time to time order. He shall receive all moneys due the company, from whatever source, and deposit the same in the bank designated by the directory as the place of deposit, and he shall make no payments or disbursements except by drafts on the treasury, signed by the president and attested by himself.

222 SECTION XI—*The Attorney.*

It shall be the duty of the attorney to examine all titles to real estate acquired by this company; to draw all bonds of titles, deeds of trust, mortgages, conveyances and other papers necessary to secure the payment of money, or the transfer of property to or from the company. The compensation for such services shall be paid by the member or other person dealing with the company, and no title shall pass or become valid until the attorney's dues are satisfied. In addition to the above it shall be the duty of the attorney to attend to all other legal business in which the company may be concerned, or in any way interested, and his compensation thereof, after being allowed by the board of directors, shall be paid by the company.

SECTION XII—*Loans, Advertisement of and Bids for Them.*

When directed by the board of directors the finance committee shall cause five days' notice to be given in one or more of the daily city papers of the time when application for loans will be received. All applications thereof shall be in writing, sealed, accompanied with applicant's bid; said application to be endorsed "Application and bid for loan," stating *that* amount required and time to repay the same. The bids to be opened by the directory in session, and loan awarded to the bidder offering the highest bid per hundred dollars thereof. Should more than one application bid the same amount, the directory shall order a new bid at same time and place. The party receiving the award shall pay interest from the date of the award.

SECTION XIII—*Real Estate—The Conditions of Its Purchase.*

No real estate shall be purchased until the same has been appraised and the purchase thereof recommended by the real-estate committee, and the title thereof pronounced good by the attorney

of the company. The president shall then upon receiving
223 from the applicant not less than twenty-five per cent. of the purchased-money, buy the property in the name of the company, and then convey to the said applicant upon such conditions as are fixed by the finance committee.

SECTION XIV—*Purchases—Conditions on Which Made.*

The purchaser shall, before the delivery of said deed of conveyance, have the property insured to the satisfaction of the real-estate committee in an insurance company or companies authorized by law to do business in the State, and the policy of insurance shall be made payable, in case of loss, to this company, and he shall keep said insurance up until said property is fully paid for; and should such said purchaser fail or refuse to keep up said insurance, the same shall be done by the company, for the said purchaser, shall be a lien upon said property, and shall be expressed in said deed of conveyance.

The said purchaser may discount any or all of his notes before maturity, at such rate of interest as the board of directors may determine; he shall also pay all taxes legally assessed against said property, and should he fail to do so the company shall pay the same, and the amount so paid shall be a lien against the property, and must be so expressed in the deed of conveyance.

SECTION XV—*Payments.*

In all loans made on the monthly plan, the amount of money advanced by the company shall be divided into equal monthly payments, and the interest shall be computed for each month at the rate bid by the borrower per annum upon the whole amount of principal then unpaid. The vendee shall execute and deliver to the company promissory notes for said payments, with interest of the whole amount of principal unpaid at the maturity of the respective notes added. One of said notes shall become due on the first day of each and every month during the time for which the advance is made, and each note shall bear interest from maturity until paid, provided that when three notes due shall remain unpaid after
maturity the balance of the notes remaining shall become
224 due, and the company have right to foreclose any lien that it may have for the security thereof; provided further, that — it should become necessary to enforce payment by law, the maker of the notes shall pay all reasonable expenses of litigation.

SECTION XVI—*Installments of Stock.*

Each stockholder, for every share of stock held by him in this company, shall pay at the office of the company the sum of five dollars on or before the seventh day in each and every month until he has paid on account of each share of said stock, the sum of three hundred dollars, exclusive of fines; and should any stockholder fail to pay the installments on his stock, as herein provided for, the

penalties and forfeitures provided for in the charter of this company, shall be enforced. In case of fines and arrearages against members, the first money paid by such stockholder, against whom fines have accrued, shall be applied first to the settlement of fines and penalties; and no payment shall be placed to the credit of such stock until the fines and penalties against the same have been liquidated and settled in full.

SECTION XVII—*Elections for the Board of Directors and Board of Auditors.*

At all elections of this corporation, each stockholder shall be entitled to one vote for every share; provided, that no member shall have more than five votes; and the fact that he may own more than five shares of stock in this company, shall not entitle him to more than five votes. No stockholder, other than absentees from the city, shall vote by proxy, and absentees from the city can vote only by written proxy, attested by two witnesses; and every such proxy, to be voted, must be registered with the secretary of this company at least one day before the election.

No share transferred within thirty days of any of the said elections shall be entitled to vote; provided, that nothing in this section shall prevent parents or guardians from voting the stock of their children or wards.

225 SECTION XVIII—*Annual Election—Failure to Hold.*

If, from any cause, the annual election of officers should fail to be held on the day specified by the by-laws, the president shall designate and advertise for three days, a day on which said election should be held, and if the president fails to call an election, any number of shareholders owning one-fourth of the capital stock, may call a meeting of stockholders to hold said election.

SECTION XIX—*Transfer of Shares.*

Subscribed shares may be transferred by the owner thereof on the payment of fifty cents for each transfer which shall go to the secretary. All transfers not registered by the secretary shall be void and of no effect.

SECTION XX—*Annual Election and Inspectors Thereof.*

An annual election of directors and auditors shall be held on the third Tuesday of April, and the president, prior to said election, shall appoint five shareholders to be inspectors of said election; any three of whom shall be competent to superintend the same; and no shareholder whose monthly dues are not fully paid up shall be entitled to vote at said election.

SECTION XXI—*Resolutions.*

The board of directors shall have power to adopt such resolutions for their government as may not conflict with the charter or by-laws of this company.

SECTION XXII—*Amendments.*

These by-laws may be amended, altered or repealed in any way not conflicting with the act of incorporation, at any stated meeting of the board of directors. Notice of the proposed amendment must be given in writing at a previous regular meeting.

SECTION X-III—*Order of Business.*

1. Reading minutes of previous meeting of board.
2. Report of secretary.
226 3. Reports of standing committees.
   *a.* Finance.
   *b.* Real estate.
   *c.* Building.
4. Report of auditors.
5. Reports of special committees.
6. Unfinished business.
7. New business.

CHARTER AND BY-LAWS OF THE ISLAND CITY SAVINGS BANK OF GALVESTON.

Incorporated by the State of Texas June 24, 1870. Act amended December 1, 1871, and June 3, 1873.

An act to incorporate the Island City Real Estate and Homestead Association.

SECTION I.

(Amended by change of name. See sec. 1, act of June 3, 1873.)

Be it further enacted by the legislature of the State of Texas, That the subscribers of the moneys heretofore paid in, under and in pursuance of an undertaking conducted in the name of T. H. McMahan, T. F. White, A. C. Baker, A. H. Belo, C. M. Mason, J. S. Vedder, W. B. Sorley, T. C. Armstrong and Cyrus Thompson as trustees of the Island City Real Estate and Homestead Association be and they are hereby incorporated under the name and style of "The Island City Real Estate and Homestead Association," and under said name and style shall take, receive and become possessed in fee of all and singular the real estate heretofore acquired and to be acquired by said trustees, as such, and under the said name and style they may transfer their rights to succession and assignment, and shall be persons capable in law of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all courts and tribunals and places whatsoever; and also that they and their successors, by the same name and style shall be in law capable of holding and conveying any estate, real, personal, or mixed, and doing and performing all things in relation to any such estates that they may think proper to do, and that may be necessary to be done, and not in contravention of the laws and the constitution of the
227

State of Texas, and especially to purchase real estate in the city and county of Galveston, State of Texas, with powers to bargain, sell and convey the same for money, cash in hand, or on time, or exchange the same for other property in said city and county, and to build upon and improve any such property as to them may appear right and proper.

SECTION II.

(Amended. See sec. 2 of act of June 3, 1873.)

Be it further enacted, That the management of the affairs of said company shall be conducted by a board of nine (9) directors, each of whom shall be a stockholder of the stock of said company, and five (5) of whom shall be a quorum to do and perform all the business necessary to the successful operation of said company. A majority of said directors shall appoint a president from their own number, and shall fill all vacancies in the directory as may from time to time take place, from death, resignation or otherwise. The election of directors shall take place in the city of Galveston on the first Monday in April in each and every year after the organization under this act, and in case of failure to elect said directors, the corporation shall not be dissolved for that cause, but the president and directors, for the time being, shall continue in office until there shall be an election; provided also, that it shall be the duty of said directors to call a meeting of the stockholders, at an early day, to elect the directory so omitted to be elected at the regular period.

SECTION III.

Be it further enacted, That each stockholder shall have one vote for each share that he or they may own, and may vote in person or by proxy.

SECTION IV.

Be it further enacted, That it shall be the duty of the said
228 trustees now acting in the premises of the present association, by and through their acting secretary, to call a meeting of the present association as soon as practicable after the passage and approval of this act, for the purpose of an organization under this act, and that until such organization shall have been perfected, the affairs of said association shall be conducted as heretofore, and that the mode of electing the directory at the first meeting aforesaid, hereinbefore named, shall be the same as that by which the present trustees were elected, except that mode be altered by a vote of two-thirds of the members present at such meeting, the mode of such election being, and to be, by a majority of votes cast.

SECTION V.

(Amended. See sec. 3 of act of June 3, 1873.)

Be it further enacted, That the capital stock shall be seventy-five thousand dollars, and it may be increased to three hundred and

sevent'-five thousand dollars or any intermediate amount, by a two-third vote of the shareholders.

(On April 1, 1873. the stockholders authorized an increase of capital to one hundred and seventy-five thousand dollars.)

SECTION VI.

(Amended. See sec. 4 of act of June 3, 1873.)

Be it further enacted, That the capital stock shall consist of the moneys heretofore paid in under the management of the said trustees, and the further sum of ten dollars, to be paid in monthly installments on each and every share of stock, the capital stock to be divided into one hundred and twenty-five shares of six hundred dollars per share.

SECTION VII.

Be it further enacted, That the president and directors shall have authority to adopt all such rules, regulations and by-laws as they may consider necessary for the proper management of this company, not in contravention of the terms of this act.

229

SECTION VIII.

Be it further enacted, That the said company may have a common seal, to be provided by the president and directors, as they like.

SECTION IX.

(Repealed. See sec. 5 of act of June 3, 1873.)

Be it further enacted, That the number of shareholders shall never exceed one hundred and twenty-five.

SECTION X.

Be it further enacted, That service of all legal process upon the president or secretary of the board of directors (which said secretary shall be appointed by the directors) shall be considered as service on said company.

SECTION XI.

(Amended. See sec. 6 of act of June 3, 1873.)

Be it further enacted, That this act or charter shall remain in full force and effect from and after the date of its passage, for and during the period of twenty years.

Approved June 24, 1870.

An act to amend an act entitled "An act to incorporate the Island City Real Estate and Homestead Association of Galveston."

SECTION I.

Be it enacted by the legislature of the State of Texas, That the Island City Real Estate and Homestead Association is hereby

created a "savings bank and trust company," and in addition to the powers granted by the act of corporation, approved June 24, 1870, may have enjoyed and exercise all the powers — purposes of a savings bank and trust company.

230

SECTION II.

The business and object of this corporation, under this amendment, shall be — receive on deposit or trust, such sum or sums of money as may from time to time be offered therefor by tradesmen, merchants, clerks, laborers, servants and others; to be repaid to such depositors when required, at such times, *when* such interest and under such regulations as the board of directors may from time to time prescribe, which regulations shall be posted up in some conspicuous place in the business room of said corporation.

SECTION III.

This corporation may loan money according to the constitution and laws of the State, upon such security, either real or personal, as the directors may deem sufficient. It may borrow money, buy and sell exchange, bullion, notes, stocks, and other securities.

SECTION IV.

The stockholders and depositors may at any time investigate the condition of the association, and at the request of any three (3) stockholders or depositors, in writing, the president shall appoint a committee of two (2) stockholders and three (3) depositors, whose duty it shall be to examine the assets and condition of said corporation, and publish their report upon examination for the information of all concerned.

SECTION V.

The said corporation may issue certificates of deposit in form as may be agreed upon by the board of directors; such certificates are to be issued only at the request of a depositor, and shall be redeemed on presentation at the office of said corporation.

SECTION VI.

When any deposit is made to said corporation by a minor, or by a female, being or hereafter becoming a married woman, the
231 said corporation may pay such depositors any sums of moneys due to them, and their receipt or acquit-ance shall be a legal discharge to said corporation therefor.

SECTION VII.

(Amended. See sec. 7 of act of June 3, 1873.)

This act shall be deemed a public act, of which all courts and magistrates shall officially take notice, and shall take effect on and after its passage.

Approved December 1, 1871.

DEPARTMENT OF STATE,
*Austin, Texas.*

I, J. E. Oldright, acting secretary of state for the State of Texas, hereby certify that the foregoing is a true copy of the original enrolled bill on file at this office.

Witness my hand and official seal, at office, in the city of Austin, the sixth day of December, A. D. 1871.

(Signed) J. E. OLDRIGHT,
*Acting Secretary of State.*

An act to change the name of the Island City Real Estate and Homestead Association of Galveston, and to amend an act entitled, "An act to incorporate the Island City Real Estate and Homestead Association of Galveston," approved June 24, 1870.

SECTION I.

Be it enacted by the legislature of the State of Texas, That the name of the Island City Real Estate and Homestead Association shall be changed to the Island City savings bank, and as such shall have and enjoy all the powers acquired under its previous name, the same as if it had not been changed, but relieved from none of its liabilities by reason of such change of name.

232 SECTION II.

That section II of said act of June 24, 1870, shall be amended to read as follows: "Be it further enacted That the management of the affairs of said company shall be conducted by a board of not less than five (5) nor more than nine (9) directors, each of whom shall be a stockholder in said company. The number of directors shall be fixed by the stockholders at a called or regular meeting next previous to next election, and a majority of such fixed number shall constitute a quorum to do and perform all the business necessary to the successful operation of said company. A majority of said directors shall appoint a president from their own number, and shall fill all vacancies in the directory as may from time to time take place, from death, resignation or otherwise. The election of directors shall take place in the city of Galveston on the first Monday in April in each and every year after the organization under this act, and in case of failure to elect said directors, the corporation shall not be dissolved for that cause, but the president and directors, for the time being, shall continue in office until there shall be an election; provided, also, that it shall be the duty of said directors to call a meeting of the stockholders at an early day to elect the directory so omitted to be elected at the regular period."

SECTION III.

That section V, of said act of June 24, 1870, shall be amended to read as follows: Be it further enacted That the capital stock shall be seventy-five thousand ($75,000) dollars, and it shall be increased to five hundred thousand ($500,000) dollars, or any intermediate amount at any time, by a majority vote of the stockholders.

SECTION IV.

That section VI, of said act of June 24, 1870, shall be amended to read as follows: Be it further enacted That the capital stock shall consist of the moneys heretofore paid in under the management of said trustees, and the further sum of ten dollars to be hereafter paid in monthly installments on each and every share of stock;
233 the capital stock to be divided into shares of six hundred (600) dollars each. All such shares, when full paid, shall be subdivided into shares of one hundred (100) dollars each and be designated as "full paid," and constitute the full capital of the savings bank. The capital stock may be increased as heretofore provided by monthly payments of ten dollars on each new share until the full share of six hundred ($600) dollars is paid, and when so full paid shall be converted into shares of one hundred ($100) dollars each as hereinbefore provided. The shares in process of payment, and until fully paid and converted, shall be known as "installment shares." In all elections held after passage of this act, each one hundred ($100) dollars of stock, shall entitle its holder to one vote; provided, however, that no fractional part of one hundred ($100) dollars shall ever be counted as part of a vote in any election or meeting of the stockholders.

See order adopted by the stockholders June 13, 1873.

SECTION V.

That section XI of said act of June 24, 1870, shall be amended to read as follows: "Be it further enacted, That this act or charter shall remain in full force and effect for the period of fifty years from the date of its passage, and shall be deemed a public act, of which all courts shall officially take notice."

SECTION VII.

Be it further enacted, That the act entitled, "An act to amend an act to incorporate the Island City Real Estate and Homestead Association of Galveston," approved December 1, 1871, is hereby made a part of the charter of the Island City savings bank, and shall remain in full force and effect for the period of fifty years from the passage of this act. Approved June 3, 1873.

At a meeting of the stockholders held June 13, 1873, the amendment to the charter was accepted, and the following order unanimously adopted:

234 Ordered, that subscriptions to new stock may now be received in accordance with the amended charter; but that it is agreed that all such subscriptions shall be for shares for one hundred dollars each, and so soon as any subscriber shall pay in one hundred dollars upon each share subscribed by him, he shall be entitled to, and the bank shall issue to him a full-paid certificate of one hundred dollars per share, and he shall be relieved from all penalties prescribed by the by-laws as soon as he shall pay one hundred dollars per share.

## By-laws of the Island City Savings Bank.

Adopted June 18, 1888.

### Article I.

The president with the directors shall meet at least once in every month, on any day and hour to be fixed by resolution of the board, for the transaction of such business as shall lawfully come before them. Five directors shall constitute a quorum for the transaction of business, but a less number may adjourn to a stated time.

No director of this company shall be taken as a bondsman or security on any bond or written obligation for this company.

### Article II.

The officers of this company shall consist of a president, vice-president, cashier and attorney, to be elected by the board of directors at their first regular meeting after election.

### Article III.

The president shall preside at all meetings of the board of directors, and preserve order therein. He shall countersign all warrants drawn on the cashier, also all contracts and all conveyances of property belonging to the company, the same having been first approved by the board of directors and recorded with their proceedings.

235 He shall have power to call a meeting of the board of directors at any time. He shall have power to order such repairs and other necessary expenditures, not exceeding one hundred dollars in each case, which he may deem proper for the interest of this company; he shall have power to invite architects to send in plans for houses to be erected by this company, and if he thinks proper to offer a reward for the best plans, the amount of said reward shall be fixed by the board of directors. The president shall appoint the following standing committees of the board, which shall each consist of three directors, to wit: executive committee, real-estate committee, building committee.

In case of a tie vote in the board of directors, the president, or in his absence, the acting president, shall have the casting vote.

### Article IV.

The vice-president, in the absence, death or resignation of the president, and until another president is elected, shall perform all the duties of the president; and in case of the absence of the president and vice-president, the board of directors shall appoint one of their number to preside.

### Article V.

The secretary shall keep a record of all proceedings of the board of directors, which shall be read at the next succeeding meeting; he shall conduct all correspondence of the company; he shall keep accurate accounts with all the stockholders; he shall attest all deeds

and contracts, and all orders drawn on the treasurer for the payment of money; he shall have in charge all books and papers appertaining to his office, and deliver them to his successor in office; he shall, at the end of every six months, make up his accounts, which shall be admitted by the executive committee, who shall furnish a report to the board of directors showing the state of the company's affairs, a printed copy of which shall be furnished to each stockholder.

He shall follow the instructions of the board of directors, and keep them informed of all matters of interest to the company.

236 He shall furnish on election day, for the use of the inspectors of election, a list of all stockholders entitled to vote, with the number of shares held by each.

He shall be prepared at all times during the business hours, to inform stockholders, at their request, of the financial condition of the company.

He shall not be permitted to hold the position as director in the board of directors of the company, but shall be permitted to attend to such business as shall not interfere with his duties as secretary of this company.

He shall call special meetings at any time when ordered by the president or by three directors. He shall receive such annual salary as the board may fix and determine, payable monthly, and for the faithful performance of his duties shall give bond, to be approved by the board, in the sum of five thousand dollars, or such additional amount as the board may from time to time order. He may, at the sitting of the board, suggest such matters as in his judgment are advantageous to the company.

## Article VI.

The treasurer shall receive all moneys paid into the office of the company, giving a receipt therefor to the secretary, pay all orders drawn on him signed by the president and attested by the secretary. He shall make a monthly report to the board of directors of the receipt and expenditures of this company. He shall give bond to the amount as the board may from time to time order, for the faitl ful performance of his duties, said bonds to be approved by the board. He shall receive such salary as the board may fix and determine, payable monthly, and shall, at the expiration of his term of office, deliver to his successor all book-, papers, and money belonging to said company, after full statement of his accounts, audited and approved by the executive committee.

## Article VII.

There shall be appointed by the board of directors a solicitor or attorney of this association, who shall be a regular attorney-at-law,

and who may be a director. His duties shall be to attend to

237 such legal business as may be necessary to be performed for the benefit of this association, to examine all titles to real estate acquired by this association, to defend or prosecute all suits

at law in which this association may be concerned, or in any way a party to. In event of requiring assistance in the conduct of any special suit at law, he may, with the consent of the board of directors, engage additional counsel. His compensation for the performance of such services shall be paid by warrant on the treasurer, after being allowed by the board of directors.

In additional to the above, it shall be his duty to draw the deeds of trust and other necessary papers required by this association to secure the payment of debts due to it by reason of sales of property to members and others, or other debts due to it, no matter how incurred. His compensation for such service shall be paid by the member or other party dealing with the association; and no title shall pass or become valid until the attorney's dues are satisfied; provided, however, that the board of directors may, at the request of such member or other purchasers, fix the rate of compensation to be paid to the attorney, in case the member or purchaser may deem his charge excessive. The action of the board, if asked, as arbiters to be accepted as final.

## Article VIII.

All real estate or other property purchased or sold by the company, shall be done through the real-estate committee, and all houses built or repaired shall be done by the building committee, and all claims and accounts against the company shall be paid on approval of the executive committee.

## Article IX.

See order adopted by the stockholders, June 13, 1873.

Each and every shareholder for each and every share of stock that he or they hold in this company shall pay the sum of ten dollars on the first Thursday after the first Monday of every month thereafter, to the secretary, or such other person as may be authorized to receive the same, until the sum of six hundred dollars has been paid on each and every such share.

238 And should any shareholder fail to pay his monthly dues at the times specified, there shall be ten per cent. added to the amount unpaid and charged against him; should the monthly payment, with the ten per cent. so added, still be unpaid when the next monthly payment becomes due, and that likewise be unpaid, then ten per cent. shall be again added to the whole amount due this company. And should said indebtedness remain unpaid, then ten per cent. shall again be added to the whole amount due and in arrears from said shareholder, and so on each following month that remains unpaid, until the dues and penalties in arrears and unpaid shall equal in amount the credits due said shareholder on the books of the company the day of his first default in payment, when said indebtedness shall be paid by his credits, and his share of stock cancelled on the books of the company, the board of directors having duly declared it forfeited.

No shareholder shall be permitted to pay his monthly dues so

long as there are any arrears for monthly dues or penalties remaining unsatisfied against him on the books of the company; and any moneys he may pay the secretary shall be credited to such arrears until the whole is paid.

If, at any time, the company shall become possessed of any shares of any of its shareholders by forfeiture, or in any other manner, said stock may, by order of the board, after due notice having been given by advertisement for ten days, be offered for sale, and sold to the highest bidder for cash; provided, always, that no bid be taken for a less sum than the par value of the shares.

ARTICLE X.

In case of the death of a shareholder, no right or benefit of survivorship shall be had or claimed by the company, but the share or shares and interest of such deceased shareholder shall go or belong to his legal representatives, who shall have and take the same benefit and privileges, and be liable to the same uses and penalties as the deceased shareholder ought to have, or could, or might have had, in case he had been living; provided, that the board of directors may, at the request and demand of the legal representatives
239 of said deceased shareholder, pay to said legal representatives the amount of money paid in by said *descendant* (less fines and working expenses due), within thirty days after such demand, and cancel said shares on the books of the company.

ARTICLE XI.

Transfers of subscribed and full-paid shares may be made in person or by duly executed power of attorney, but no transfer of a part-paid share to be allowed or valid if the party transferring it is indebted to the company.

All transfers not registered by the secretary shall be deemed void and of no effect. The purchaser is entitled to all the benefits and privileges, and subject to all the rules and regulations, and liable to all the duties and penalties of the original shareholders.

No charge shall be made for transfer of shares.

Island City savings bank.

| | | | |
|---|---|---|---|
| Capital..... | $175,000 | Paid..... | $—— |
| Shares..... ..... | 100 | To be paid..... | —— |

This is to certify that —— —— is entitled to — shares of the capital stock of the Island City savings bank, now standing in his name on the books thereof — dollars *has* been paid in upon said shares, and there remains to be paid — dollars, in consecutive monthly installments of ten dollars on each share, until the full sum of — dollars is paid, when a full-paid certificate shall be issued to —— —— or —— assigns, upon surrender of this.

Provided, however, that reference is hereby made to the by-laws of this bank prescribing rules of penalty and forfeiture in case the said monthly payments are not made as stipulated; and it is understood and agreed, between —— —— and this bank that this cer-

tificate of stock is transferable only on the books of the bank and not until all penalties and installments, provided for by the by-laws, are duly paid and satisfied, and this certificate surrendered.

240 In witness whereof, the president and cashier attest hereto, and impress the seal of this bank, at Galveston, this — day of ——, 188–.

[SEAL.] —— ——, *President.*

—— ——, *Cashier.*

NOTE.—Purchasers or assignees are warned to inquire at the savings bank before bargaining for this certificate, as no transfer can be made until all installments due, and penalties incurred by the holder are satisfied, as provided by the by-laws.

I accept this certificate subject to the provisions and requirements of the by-laws in reference to penalties and forfeiture, and agree to abide by the forfeiture of this share of stock under said by-laws, and in case I make default in payment of fines or installments as therein provided.

No. —.

— shares.

Transferred from No. —.

In name of —— ——.

GALVESTON, —— —, 188–.

Received the above certificate which I accept with the provisions contained therein, and agree and bind myself to pay the monthly installments as they become due. I further agree to pay the fines prescribed by the by-laws, in case I do not pay said installments promptly; and hereby agree to, and submit to the forfeiture provided for by the said by-laws, in case I make default in said payments, and will not contest or object to said forfeiture, if incurred, but will surrender this certificate to the cashier of the savings bank when called upon to do so, after such forfeiture has been declared by the board of directors.

—— ——.

Witness:

—— ——.

The provisions of this by-law have been inoperative since the savings bank was organized, as no more homesteads will be built for stockholders.

Any shareholder desirous of purchasing a homestead from the company shall make his application in writing to the board, setting forth by numbers the lot or lots (not ex-

241 ceeding two), and also the specifications of the buildings to be erected thereon, which her wishes to purchase, and the amount he is willing to pay for said property when completed. Said application shall be considered as filed and the board of directors, when the price is agreed on, and the funds in the treasury will warrant, shall direct the building committee to have erected on said lot or lots a dwelling-house in accordance with said specifications; and

when completed, the company, through its proper officers, shall execute to said purchaser a bond for title to said property, and to be paid in the following manner: One-fourth cash in hand, one-eighth in twelve months, one-eighth in eighteen months, one-fourth in twenty-four months, and one-fourth in thirty months from the date of the title bond; the shareholder purchasing, executing his notes for said several amounts unpaid bearing 10 per cent. interest from date of each note, a vendor's lien being reserved upon said property for the prompt payment of said notes with interest accruing thereon, and all costs incurred by the company in the collection of said notes in case it is compelled to institute suit on the same. And when all of said notes, interest and costs incurred, should there be any, shall have been paid, the company shall make a deed of said property to said purchaser, his legal representatives or heirs-at-law, and to none others.

No purchaser shall, before the delivery of said title bond, have said property insured in a company chartered by the legislature of this State, and the policy of insurance shall be by him transferred to the company, and he shall keep said insurance up until said property is fully paid for; and should said purchaser fail or refuse to keep up said insurance, the same shall be done by the company, and the amount of money so paid by the company for the purchaser, shall be a lien upon said property, and shall be so expressed in said bond for title.

The said purchaser may liquidate any or all of said notes before maturity, or he may pay such amounts as he can, at any time previous to maturity, but not less than twenty dollars at a time, and the same shall be placed to his credit, and ten per cent. interest per annum shall be allowed him on such payments. He shall also pay all taxes regularly assessed against said property from the date of the title bond.

242 No shareholder who is in arrears with his monthly installments or fines for non-payment of same, can purchase a homestead from the company until the same are fully paid up. And if any homestead property, when completed, is not taken by a shareholder, in accordance with the foregoing stipulations, the same may be rented or sold to third parties on such terms as the board of directors may think proper.

## Article XIII.

The real-estate committee shall cause to be made, and kept in the office of the company a map or plat of all the real estate owned by the company, designated by numbers, blocks and lots, and shall assess a value to each lot by number, which shall be approved by the board of directors and recorded by the secretary, and said valuation shall be revised every six months, or oftener, by the board of directors; and said property, when sold, shall be by alternate lots, or alternate two lots, as the board of directors may order, but not more than two to any one shareholder.

Any shareholder desirous of purchasing from the company any of said lot or lots, without buildings, shall make his application in

writing to the board, setting forth by number the lot or lots he wishes to purchase, and if undisposed of, the same shall be sold to said shareholder at their assessed value, and upon the same terms and conditions as are stated and set forth in article XII; and upon a full compliance of the conditions on his part, the company shall execute a deed of said lot or lots to said purchaser, his legal representatives or heirs-at-law, and to none others.

ARTICLE XIV.

Any shareholder who is not in arrears for monthly installments or for fines thereon, who feels himself unable to continue his stock, and who does not wish to transfer it, may make application to the board of directors, at any stated meeting of the board, setting forth the facts as above stated, and upon such application the board shall set apart to him any of the lands of the company at its assessed value, to the value of the amount paid in on his stock. Said
243 land the board of directors shall deed to him in full consideration of his stock, which stock shall be sunk or retired; provided, that not more than one lot shall be so deeded. If the assessed value of the lot is greater than the value of the share, the purchaser shall pay the difference in cash.

ARTICLE XV.

The president prior to the annual election shall appoint five shareholders to be inspectors of the annual election, any three of whom shall be competent to superintend the same; and no shareholder whose monthly dues are not paid up shall be entitled to vote at said election.

Amended by adding: Any person applying to purchase real estate of this association at valuation agreed upon by the real-estate committee may be allowed to do so upon such terms as the board of directors may fix and determine; and the board may offer lots for sale at auction when deemed for the interest of the association to do so.

ARTICLE XVI.

The annual election for directors shall be held in the city of Galveston on the first Monday in April, at such time and place as may be designated by the president.

ARTICLE XVII.

These by-laws may be amended, altered or repealed in any way not conflicting with the act of incorporation, at any stated meeting of the board of directors. Notice of the proposed amendment must be given in writing at a previous regular meeting.

*Rules for Government of the Island City Savings Bank.*

Adopted June 11, 1888.

The savings bank of this association, as organized by the
244 board of directors, is for the purpose of receiving such sums of money as are the profits of industry and economy and

that depositors may have the twofold advantage of security and profit.

ARTICLE I.

The bank shall be opened daily, Sundays excepted, from nine o'clock a. m. to three p. m.

ARTICLE II.

All persons applying shall have the privilege of depositing any sum of money, not less than fifty cents, provided the same be in specie, or in bills taken on deposit by the incorporated banks of the city of Galveston. Deposits will be received in gold, silver and currency, and interest, as hereafter provided, calculated, and payments made in kind.

ARTICLE III.

Guardians may deposit for the benefit of their wards, and parents for their children, subject to the control of such guardians or parents, and a deposit made shall be subject to the control of the party making the same, regardless of their legal status, or the adverse claims of others, unless enforced by due legal process. But when a deposit shall be made by a minor or female married, or who may become married they shall be entitled to draw and control the same, and their receipt shall be an acquittance.

ARTICLE IV.

Each depositor shall, on making the first savings deposit, give his or her name, residence and occupation, and receive a pass book, so called, wherein shall be entered in words and figures such and all subsequent deposits and payments made; the deposits, when made, to be signed by the cashier, and at the time of receiving such book, the depositor and cashier shall sign such regulations governing deposits, as shall be deemed essential to the contract, and shall be printed in said pass book.

245 ARTICLE V.

Savings depositors may draw their deposits at any time in the manner hereafter prescribed, but no deposit or any part thereof withdrawn within thirty days from the date of placing the same in bank shall receive interest.

No sum exceeding twenty dollars shall be drawn at one time, unless thirty days' notice is given to the bank, in writing, by the depositor; but the bank may, at its discretion, dispense with such notice.

(The practice of the bank has been not to require notice, but the rule is retained, and may be enforced for its protection.)

ARTICLE VI.

The finance committee of the board of directors may, at their discretion, return any savings deposit, on giving one month's notice, the interest to cease at the expiration of the notice.

ARTICLE VII.

All notices in relation to deposits, or depositors, published by, or under the direction of the finance committee, in any one of the daily newspapers of the city of Galveston, for three days successively, shall be deemed and taken as notice to each depositor.

ARTICLE VIII.

Interest at the rate of four per cent. per annum will be allowed on savings and deposits for every entire calendar month they may be continued, computing from the first day of the month succeeding the deposit, nor will interest be allowed on a sum less than five dollars, nor will a fraction of a month be allowed for in calculation.

ARTICLE IX.

The interest due each savings depositor will be added to the principal of his or her account, on the books of the bank, and transferred to the pass book of the depositor, on the first day of April and the first day of October of each year, and as then forming a part of the principal, be entitled to the like benefit of a deposit on the same amount.

246 ARTICLE X.

All checks, drafts and certificates must be signed by the president or cashier, and in the absence of the president, by the vice-president.

ARTICLE XI.

The cashier shall make a report to the board of directors, in writing, of the condition of the savings bank once every month, and keep a daily statement book for reference, which shall exhibit the condition of the bank.

ARTICLE XII.

The president or any member of the board of directors of the bank shall have access to the books of the bank at any time for the purposes of examination.

ARTICLE XIII.

A cashier shall be nominated by the board of directors, and upon his election by the board of directors shall enter upon the duties of his office, but before entering upon those duties shall give a good and sufficient bond in the sum of twenty thousand dollars.

ARTICLE XIV.

The savings bank shall not be required to pay any draft unless made by the depositor, him, or herself or their executor or administrator, and always accompanied by the pass book. Although the institution will endeavor to prevent frauds on the depositors, all payments to persons producing the pass book shall be valid and discharge the institution from liability.

ARTICLE XV.

All accounts to which no deposits, and from which no drafts shall be made for two years successively, shall be closed, and neither such deposits nor interest thereon accrued, shall draw interest after said two years are expired.

247 ARTICLE XVI.

Every person depositing money shall be furnished with a pass book, containing his or her account, in which deposits shall be entered as soon as made, as heretofore set forth. This book to be brought to the bank each time a deposit is made, or money withdrawn, that the transaction may be regularly entered. No money shall be paid except to the party having made the deposit or to his or her written order, in either case with the pass book accompanying, and the depositor or person authorized to receive for him or her, shall receipt for the amount received in the bank books, and at the same time the entry be made in the pass book by the bank. In case of an order to pay a party bearing the pass book, the order shall be filed by the cashier, and the party paying the money shall witness the receipt in the company's books. The depositor's accounts shall be numbered on the bank books, and each pass book numbered to correspond.

ARTICLE XVII.

The board of directors shall meet on every Tuesday at 12 m., (if the same be not a legal holiday), or at such hour as the board shall from time to time appoint. A majority of all the directors of this bank shall be necessary to constitute a quorum for the transaction of any business.

ARTICLE XVIII.

The salaries of all persons employed by the bank shall be fixed by the resolutions of the board, and in every election to an office by the directors there shall be a previous nomination of the candidate at least one week before the election.

The votes of a majority of all directors shall be necessary for the appointment of any officer or servant of the bank.

ARTICLE XIX.

No officer of the bank shall be permitted to receive any compensation or perquisite growing out of any business or agency
248 connected with the bank; nor shall the cashier, or any subordinate officer in the employ of the association, engage in any business pursuit conflicting with his duties as such officer, nor directly or indirectly be engaged in any speculation in stock.

ARTICLE XX.

A book shall be kept for the purpose of recording loans and discounts, with a list of the securities taken for such loans, to be open at all times for the directors' inspection.

ARTICLE XXI.

The negative of two directors present shall reject any note offered for discount, or proposal for the loan of money, and they shall not be required to give their reasons therefor.

ARTICLE XXII.

The president may, and, at the request of any three of the directors, it shall be his duty, or in his absence the duty of the cashier to call a meeting of the board of directors. He or the cashier shall keep possession of the seal of the association, and its deeds and bonds, and he shall superintend all departments of the bank.

ARTICLE XXIII.

Overdrafts are not to be permitted.

ARTICLE XXIV.

The cashier, in addition to his ordinary duties, shall carefully observe the conduct of all clerks and inferior officers, and report to the board such instances of neglect, incapacity or bad conduct as he may discover in any of them. It shall also be his duty to attend the meetings of the board of directors, and keep minutes of the proceedings of every meeting of the board. He shall exhibit a general statement of the accounts of the bank, and wherever the cash on hand shall disagree with the cash account, he shall report the same to the president and board of directors without delay.

249 ARTICLE XXV.

The cashier, clerk and other persons in the employ of the bank, shall give bonds to the association, with sureties conditional for the faithful performance of their respective duties, and such bonds shall be submitted to the board annually for their approval. The penalty of such bonds shall be as follows:

For the cashier, twenty thousand dollars ($20,000).
For the tellers, each, ten thousand dollars ($10,000).
For the book-keepers, each, five thousand dollars ($5,000).
For the clerks, each, five thousand dollars ($5,000).
For the messengers, each, five thousand dollars ($5,000).

No member of the board of directors shall be received as surety for any officer, clerk, or other employee of the bank.

ARTICLE XXVI.

No clerk, teller, book keeper, messenger or porter of the bank shall open an account therein, but their respective salaries shall be paid to them monthly by the cashier.

ARTICLE XXVII.

Any officer, teller, or book-keeper of the bank who shall suffer an overdraft to be made, or shall not communicate to the president and

cashier information of any that may come to his knowledge, or any disagreement of cash with the cash accounts, or any other discrepancy, or any other irregularity, shall be deemed as having furnished good cause for his removal.

ARTICLE XXVIII.

It shall be the duty of the president to appoint a committee of not less than two directors, who shall, at least four times in each year, ascertain the condition of the bank, examine the discounted notes, and compare the amount thereof with the balance of the bills discounted in the ledger; also, to examine the books and accounts, and evidences of stock, securities and property of the association, count the cash on hand and make an estimate of the value of all the assets of the bank, including any suspended debt, and report the same in writing to the board of directors.

ARTICLE XXX.

The cashier, clerks and all other persons in the employ of the bank, shall, previous to entering upon the duties of their several stations, bind themselves to conduct the business of the bank, in their several capacities, honestly, faithfully and to the best of their knowledge and abilities and to preserve strict secrecy in relation to the accounts and concerns of the institution and all the debates of the board. Any violation of this article will subject the offender to immediate dismissal.

ARTICLE XXXI.

If any person claims a certificate of bank stock, or certificate of deposit, or certified check to be issued in lieu of one lost or destroyed, he shall advertise in one or more of the public newspapers in the city of Galveston, Texas, at least twice a week, for the space of six weeks, an account of the loss or destruction, describing the certificate and its number, calling on all persons to show cause why a new certificate shall not be issued in lieu of that lost; and he shall transmit to the bank his affidavit of the loss and the advertisement before mentioned, and give the bank a satisfactory bond of indemnity against any damage which may arise from issuing the new certificate, whereupon the cashier shall, after the notice by the advertisement as aforesaid, issue a new certificate of the same number and tenor with that said to be lost or destroyed and specifying that it is in lieu thereof.

ARTICLE XXXII.

A standing committee shall be appointed to be known as the finance committee, consisting of the president, cashier and the three directors (any two of whom are authorized to act with the president or cashier), who shall have power to discount, extend regular lines of credit and to buy and sell bills of exchange, and shall at each regular meeting of the board make a report of the bills purchased by him.

ARTICLE XXXIII.

The cashier shall count the cash in person and verify the same at least once in every week, and report the result to the board of directors at each regular meeting.

ARTICLE XXXIV.

The paying and receiving tellers shall carefully count the cash daily, and report the result to the president or cashier; should the count differ with the amount as stated in the cash book, he or they shall recount said cash and ascertain, if possible, where the difference exists.

ARTICLE XXXV.

The president shall, as soon as practicable, report to the board of directors any and all discrepancies or irregularities which may come under his observation or be reported to him by the officers of the bank.

ARTICLE XXXVI.

The tellers shall stamp with the hand stamp on the face of each check, or certificate of deposit, or other evidence of payment received by him, the word paid, and the date of payment, before filing the same on the block file.

ARTICLE XXXVII.

The book-keeper shall balance the cash book daily, but shall make no entry therein without having full evidence of its correctness; he shall report to the president or cashier the amount of cash on hand each day, and shall stamp with a hand stamp the word entered, with the date of entry, on the back of each check, certificate of deposit, or other evidence of payment, or credit, before filing the same.

ARTICLE XXXVIII.

No officer or employé shall give a receipt or certificate for
252 any money, packages, bonds, or other article of value left with the bank for safe keeping, except it be in the regular business transactions of the bank.

ARTICLE XXXIX.

The exchange clerk shall enter on the stub of the exchange book the amount of premium received, or of discount paid in each transaction, and from the said book the book-keeper shall compile the premiums and discounts for entry in the cash book.

ARTICLE XL.

The cashier, and all subordinate officers and employés of the bank, shall be elected or appointed to hold their offices respectively during the pleasure of the board of directors. They may be dismissed at any time by the board of directors, in which event their salaries and compensation shall cease from the date of their dismissal or discharge.

ARTICLE XLI.

Any of the rules and regulations of this bank may, in any emergency, be suspended by the unanimous vote of the board at any meeting thereof, if a majority of the whole board shall be present, but such suspension not to continue longer than one week.

The president may, at any time, when the board is not in session, if he deems it necessary for the safety or interest of the bank, suspend the power of any officer of the bank until the next meeting of the board, when he shall report the fact and his reasons for doing it.

ARTICLE XLII.

None of the foregoing rules shall be repealed or altered unless a majority of all the directors vote for the repeal or alteration, nor unless upon a motion offered for that purpose at a previous meeting of the board.

*Order of Business.*

1. Reading minutes of previous meeting of the board.
2. Report of standing committees; first, finance; second, examining.

253 3. Reports of special committees.

4. Business undisposed of.
5. New business.

BY-LAWS OF THE FIRST NATIONAL BANK OF GALVESTON.

Revised February 7, 1888.

ARTICLE I.

The bank shall be open for the transaction of business every day in the year (except Sundays and legal holidays) from 9 o'clock a. m. to 3 o'clock p. m.

ARTICLE II.

The board of directors shall meet on every Tuesday (if the same be not a legal holiday) at such time as the board shall from time to time appoint. A majority of all the directors of this bank shall be necessary to constitute a quorum for the transaction of any business.

ARTICLE III.

The salaries of all persons employed by the bank shall be fixed by resolution of the board; and in every election to an office by the directors there shall be a previous nomination of the candidate at least one week before the election.

The votes of a majority of all the directors shall be necessary for the appointment of any officer or servant of the bank.

ARTICLE IV.

No officer of the bank shall be permitted to receive any compensation or perquisite growing out of any business or agency connected

with the bank. Nor shall the cashier, or any subordinate officer in the employ of the association, engage in any business pursuit conflicting with his duties as such officer, nor directly or indirectly be engaged in any speculation in stock.

254 ARTICLE V.

A book shall be kept for the purpose of recording loans and discounts with a list of the securities taken for such loans, to be open at all times for the directors' inspection.

ARTICLE VI.

The negative of two directors present shall reject any note offered for discount, or proposal for the loan of money, and they shall not be required to give their reasons therefor.

ARTICLE VII.

The president may, and, at the request of any three of the directors, it shall be his duty, or in his absence the duty of the cashier, to call a meeting of the board of directors. He or the cashier shall keep possession of the seal of the association, and its deeds and bonds, and shall keep an account of the circulating notes, signed by him, and he shall superintend all departments of the bank.

ARTICLE VIII.

Overdrafts are not to be permitted.

ARTICLE IX.

The cashier, in addition to his ordinary duties, shall carefully observe the conduct of all the clerks and inferior officers, and report to the board such instances of neglect, incapacity or bad conduct as he may discover in any of them. It shall also be his duty to attend the meetings of the board of directors, and keep minutes of the proceedings of every meeting of the board. He shall exhibit a general statement of the accounts of the bank, and whenever the cash on hand shall disagree with the cash account, he shall report the same to the president and board of directors without delay.

ARTICLE X.

The cashier, clerks and other persons in the employ of the bank, shall give bonds to the association, with sureties, conditional
255 for the faithful performance of their respective duties, and such bonds shall be submitted to the board annually for their approval. The penalty of such bonds shall be as follows:

For the cashier, twenty-five thousand dollars ($25,000).
For the tellers, each, fifteen thousand dollars ($15,000).
For the book-keepers, each, ten thousand dollars ($10,000).
For clerks, each, five thousand dollars ($5,000).
For messengers, each, five thousand dollars ($5,000).
For notary, ten thousand dollars ($10,000).

No member of the board of directors shall be received as surety for any officer, clerk, or other employee of the bank.

ARTICLE XI.

No clerk, teller, book-keeper, messenger or porter of the bank shall open an account therein, but their respective salaries shall be paid to them monthly by the cashier.

ARTICLE XII.

Any officer, teller, or book-keeper of the bank who shall suffer an overdraft to be made, or shall not communicate to the president and cashier information of any that may come to his knowledge, or any disagreement of cash with the cash accounts, or any other discrepancy, or any other irregularity, shall be deemed as having furnished good cause for his removal.

ARTICLE XIII.

No person but the president or cashier shall certify a check, draft or note; and the person certifying *and* paper shall cause it to be charged immediately to the party in whose favor it is certified.

ARTICLE XIV.

It shall be the duty of the president to appoint a committee of not less than two directors, who shall, at least four times in
256 each year, ascertain the condition of the bank, examine the discounted notes, and compare the amount thereof with the balance of the bills discounted in the ledger; also, to examine the books and accounts, and evidences of stock, securities and property of the association, count the cash on hand, and make an estimate of the value of all the assets of the bank, including any suspended debt, and report the same in writing to the board of directors.

ARTICLE XV.

The cashier, clerks and all other persons in the employ of the bank, shall previous to entering upon the duties of their several stations, bind themselves to conduct the business of the bank in their several capacities, honestly, faithfully and to the best of their knowledge and abilities, and to preserve strict secrecy in relation to the accounts and concerns of the institution and all the debates of the board. Any violation of this article will subject the offender to immediate dismissal.

ARTICLE XVI.

If any person claims a certificate of bank stock, or certificate of deposit, or certified check to be issued in lieu of one lost or destroyed, he shall advertise in one or more of the public newspapers in the city of Galveston, Texas, at least twice a week, for the space of six weeks, an account of the loss or destruction, describing the certificate and its number, calling on all persons to show cause why a new certificate shall not be issued in lieu of the lost; and he shall transmit to the bank his affidavit of the loss and the advertisement before mentioned; and give the bank a satisfactory bond of indemnity against any damage which may arise from issuing the new

certificate, whereupon the cashier shall, after the notice by the advertisement, as aforesaid, issue a new certificate of the same number and tenor with that said to be lost or destroyed and specifying that it is in lieu thereof.

ARTICLE XVII.

257 A standing committee shall be appointed, to be known as the finance committee, consisting of the president, cashier and three directors, (any two of whom are authorized to act with the president or cashier), who shall have power to discount, extend upon lines of credit, and to buy and sell bills of exchange, and shall at each regular meeting of the board make report of the bills purchased by them.

ARTICLE XVIII.

The cashier shall count the cash in person and verify the same at least once in every week, and report the result to the board of directors at each regular meeting.

ARTICLE XIX.

The paying and receiving tellers shall carefully count the cash daily, and report the result to the president or cashier; should the count differ from the amount as stated in the cash book, he or they shall recount said cash and ascertain, if possible, where the difference exists.

ARTICLE XX.

The president shall as soon as practicable, report to the board of directors any and all discrepancies or irregularities which may come under his observation or be reported to him by the officers of the bank.

ARTICLE XXI.

The tellers shall stamp with a hand stamp on the face of each check, certificate of deposit, or other evidence of payment received by them, the word paid, and the date of payment, before filing the same on the block file.

ARTICLE XXII.

The book-keeper shall balance the cash book daily, but shall make no entry therein without having full evidence of its correctness; he shall report to the president or cashier the amount of cash on hand each day, and shall stamp with a hand stamp the word entered with the date of entry on the back of each check, certificate of deposit, or other evidence of payment, or credit, before filing the same.

ARTICLE XXIII.

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ARTICLE XXIV.

The exchange clerk shall enter on the stub of the exchange book the amount of premium received, or of discount paid on each transaction, and from the said book the book-keeper shall compile the premiums and discounts for entry in the cash book.

ARTICLE XXV.

The cashier and all subordinate officers and employees of the bank shall be elected or appointed to hold their offices respectively during the pleasure of the board of directors. They may be dismissed at any time by the board of directors, in which event their salaries and compensation shall cease from the date of their dismissal or discharge.

ARTICLE XXVI.

Any of the rules and regulations of this bank may, in an emergency, be suspended by the unanimous vote of the board at any meeting thereof, if a majority of the whole board shall be present, but such suspension not to continue longer than one week.

The president may, at any time when the board is not in session, if he deems it necessary for the safety or interest of the bank, suspend the power of any officer or employee of the bank until the next meeting of the board, when he shall report the fact and his reasons for doing it.

ARTICLE XXVII.

None of the foregoing rules shall be repealed or altered, unless a majority of all the directors vote for the repeal or alteration, nor unless upon a motion offered for that purpose at a previous meeting of the board.

259 MOSE FREIBERG, witness for defendant-, testified by deposition as follows:

I am familiar with the character and purpose of this suit. I personally testified as a witness on the trial thereof in the district court of Galveston county. I was one of the partners of Freiberg, Klein & Co., in December, 1892, and made a transfer of the goods which were seized by attachment. Our firm had been in business seventeen years when the deed of trust to Sonnentheil was made. It was made on Thursday evening, I think. Our partner, Joseph Seinsheimer, had charge of the books with L. A. Grelling, our bookkeeper, employed by us. So far as the solvency of our firm when the deed of trust was made is concerned, I think the deed of trust answers the question. I discovered the status of the business on or about February 1, 1891. Our financial condition came to my knowledge at that time. L. A. Grelling called my attention to it by handing me a pencil statement to be shown Mr. Seinsheimer, who was sick at home at that time, and which statement Seinsheimer had asked me to get Grelling to make, and I examined the statement which gave me our financial condition.

(The following testimony from the same witness was offered by the defendants, and at the time it was offered was objected to by the plaintiff, as stated below:)

When I handed the statement to Mr. Seinsheimer I called his attention to the fact that the business had lost heavily and was way behind. He told me I was mistaken and that Grelling did not know anything about the books or what he was talking about or words to that effect. He said as soon as he was able to be up he would show me Grelling was mistaken. Upon my return to the store Mr. Grelling asked me what Mr. Seinsheimer had said, and I repeated Seinsheimer's remarks. Mr. Grelling then remarked, "I know a damned sight more than he thinks I know." I pressed him for an explanation. He finally stated that to his knowledge Mr. Seinsheimer had been robbing the firm of large sums of money ever since he (Grelling) was in our employ. I asked him for particulars, and he went over the books with me and showed me where false and fictitious entries had been made in the cash book
260 for years back, which entries then satisfied me that Grelling was correct. I did not say anything more to Mr. Seinsheimer until he was convalescent and came to the store, but I at once telegraphed to Mr. Sam. Klein, my other partner in Dallas, to come to Galveston and acquainted him with the state of affairs, and satisfied him that Grelling's revelations were correct, and that the firm's books showed false entries. At the same time Mr. Morris Freiberg, of Cincinnati, the partner of Freiberg & Workum, happened to be in Galveston, and I also told him of the condition of our business, whereupon he demanded an immediate settlement of our indebtedness to Freiberg & Workum, which was very large, they being our principal creditors. It was about February 1st when I wired Sam. Klein at Dallas—as soon as Grelling convinced me of the false entries in the books and on his arrival here in Galveston, and Morris Freiberg being here I conferred with both of them alone at that time. When Morris Freiberg demanded and exacted a settlement with his firm, I induced him to go over to New Orleans, and await developments. I did not wish him to remain around our store, and arouse suspicion. On Seinsheimer's convalescence he was notified and returned to Galveston and we then made the settlement with him of $120,000 for $210,000, scaling off $90,000. That is about all that took place then. I think on the former trial of this cause I stated that at this time we had the consultation at Fellman's residence. If I did so state it was an error as to time; that conference did not take place until about two months later, and my recollection has been refreshed on that point by Mr. Sam. Klein. As stated by me I did find peculiar and improper entries in the books of our firm, large and numerous items were charged up twice and errors were made in addition columns in the cash book, always showing larger amounts paid out than were actually paid. All these entries were made in Mr. Seinsheimer's handwriting. To the best of my recollection, upon Morris Freiberg's return from New Orleans we made a settlement with him for the debt due his firm. To meet this settlement each of the three members of Freiberg, Klein & Co. was to

put $20,000 into the business. I put in $20,000 by taking
261 $12,000 I had saved up and borrowed $8,000 from my uncle Julius Freiberg, of Cincinnati. Mr. Klein put in his part, I think, some of which he told me he had borrowed from his brother in Cincinnati, and Mr. Seinsheimer put in $20,000 realized by the sale of his residence in Galveston to Julius Freiberg. With this additional capital and a scaling of the debt of Freiberg & Workum we expected to be able to pull through, but after running on for a couple of months we found we could not meet our obligations and we found it necessary to have a consultation with Mr. Fellman, Mr. Grumbach and Mr. Kempner, who were indorsers on our notes to a large amount. At this meeting the condition of our business was fully explained and discussed. This meeting took place at Mr. Fellman's residence, in Galveston, Texas. Mr. Fellman stated he could not raise any money. He was at the end of his resources. He said he was at the end of his resources. He said he was indorser for large amounts to other parties, and he was at the end of his rope. He and Mr. Kempner advised me to go to Cincinnati and try to get Freiberg & Workum to assume Fellman's endorsement on our paper, and Fellman would be willing to pay them $25,000. I agreed to go to Cincinnati and try, but before leaving the meeting it was agreed between all parties, happen what may, Fellman should be fully protected by Freiberg, Klein & Co. I went to Cincinnati, but did not succeed in making the arrangement, and on my return we had another consultation at Mr. Grumbach's residence at which all the parties, Fellman, Grumbach, Kempner, Klein, Seinsheimer and myself were present. I reported what transpired in Cincinnati, and that Freiberg & Workum declined to release Fellman as our endorser, and we then agreed that we should try to pull through, but if we could not, we should fully protect Mr. Fellman by a bill of sale of our stock and business whenever we found we could no longer meet our obligations. Mr. Kempner was Mr. Seinsheimer's brother-in-law. Mr. Fellman was Mr. Seinsheimer's father-in-law, and Mr. Grumbach and Mr. Seinsheim- were brothers-in-law, or rather they married sisters, the daughters
of Mr. Fellman. After making the settlement with Freiberg
262 & Workum I insisted on Mr. Seinsheimer informing Mr. Fellman of the condition of our business and he claims he did. When we ascertained we could not meet the terms of this settlement and our other obligations, I went to see Mr. Fellman myself and told him all about the business except Mr. Seinsheimer's stealings, and it resulted in our meeting at Fellman's residence—I do not remember who suggested the meeting at Fellman's house. The only pecuniary interest Mr. Fellman had in the condition of the firm was that he was endorser on Freiberg, Klein & Co.'s paper for a very large amount—I think it was about $135,000. Mr. Fellman told me that if Freiberg, Klein & Co. failed without protect/ng him he also would have to fail. This was all the business relations between him and our firm. He endorsed for the firm and was to that extent involved as endorser and has been so for years. After the meeting at Fellman's house we continued our business the same as

before. I have already stated, and now repeat the agreement was we were to fully protect Fellman if it became necessary to go under. Our primary purpose as understood at that meeting, was that we should pull through if possible, if not possible, then would protect Fellman at all hazards. The agreement and plan adopted at this meeting provided that Mr. Fellman or his firm should be protected in any event against the effects of endorsement for Freiberg, Klein & Co. I went to Cincinnati, as I have stated. It was at the request of Fellman and also Kempner, who wished me to see if Freiberg & Workum would assume Fellman's obligation on our paper, by his endorsement, upon Fellman's paying them $25,000. I mean they were to step into Fellman's shoes on all our paper that Fellman had endorsed. Freiberg & Workum declined the proposition. I communicated the result of my visit to Cincinnati to Mr. Fellman, and then the conference was had as before stated at Grumbach's residence. Klein came down from Dallas, Fellman, Grumbach, Kempner, Klein and myself were present. I communicated the result of my visit to Cincinnati, and that Freiberg & Workum declined to accede to Fellman's request. This was some time about May, 1891, at Grumbach's residence in Galveston, Texas. We came together by agreement and under the circumstances, that our financial condition required consul-
263 tation. I do not remember who first suggested the meeting. It may have been one or the other of our firm or several of us. The meeting, under the circumstances, almost suggested itself. Fellman, Grumbach, Kempner, Klein, Seinsheimer and myself were present, as I have stated. I reported that Freiberg & Workum declined Mr. Fellman's proposition. I cannot remember exactly what Mr. Fellman then said, except he was disappointed at the result. I do not remember exactly what the others said, except that in general our financial condition was discussed and the bad results to follow if we could not pull through. I do remember that Mr. Kempner said to Mr. Fellman not to be uneasy, and he (Kempner) would stand behind him (Fellman) and furnish him with all the funds he needed until the end came. In conversation among us it was remarked that we should try to pull through, if possible. At that time I considered the firm solvent, but embarrassed. It was a fact business was not prosperous, and the outlook was extremely gloomy. At that meeting the conclusion generally was that we were to continue business. On this subject Mr. Fellman stated as his reason, that his affairs were in such a condition it meant ruin to him if we were to discontinue business, or fail therein; that he was on a large amount of paper, and if the fact leaked out it would break him. He expected a large amount of this paper to be retired or paid, and he insisted upon our keeping on until he was in proper shape. We agreed to keep on as long as we could. The others concurred in this understanding on Mr. Fellman's account. I cannot recollect what each one of us said, except in general terms, that we must continue business. The object in continuing the business was to pull through, if possible, and to protect Mr. Fellman, who was on our paper. I do not think we took any stock at that time. We

usually took stock on the 1st of February in each year. When we took stock on February 1st, 1892, we found the condition of business in bad shape. The business was growing less profitable, and the outlook was very bad indeed. It is difficult to say whether it was solvent or insolvent at that time. From the first meeting at Fellman's house to the time of the execution of the trust deed to
264 Sonnentheil, December 16, 1892, the condition of our firm and of its business, was known to all these parties, Fellman, Grumbach and Kempner, and all the partners, were kept fully posted of the condition of the business except as to the stealings of Mr. Seinsheimer, which was kept up, up to the time of giving the deed of trust. As to our firm being in condition February 1, 1892, to continue business, buying goods and keeping its stock up without obvious peril to its creditors, subsequent results of our business answer this question. We realized that things looked very gloomy and that it would take some extraordinary good fortune to pull us through. We paid cash for goods when we could not get credit. We tried to get as long credit as possible. I think most people do. We had considerable trouble to get credit after the spring of 1892; during the spring and summer of 1892 we were restricted or entirely cut off from credit by parties from whom we had bought on credit for many years. There was considerable talk and rumor of our firm being in a failing condition. Intimation came to me by being refused credit, and we asked for explanations and were told why. We received several letters upon the subject, and we realized that we could not continue unless we met with extraordinary good luck or fortune. We continued to purchase goods up to within a few days of giving the deed of trust. I don't remember the date of the last purchase. It was within a few days of our failure. We bought on credit. We bought some goods for cash in the summer which we had to have to keep up the stock. My recollection is that Mr. Fellman was in New York in the early part of December, 1892, and he was telegraphed to come to Galveston. Mr. Seinsheimer telegraphed him to come home. The occasion of his being summoned was that upon consultation among ourselves we found we could not keep up the business many days longer; that we had some large notes maturing and we had to call him home so we could prefer and secure him for his endorsement, or raise more money to meet our obligations. He returned a few days after he was telegraphed to come. It is true that if we could not raise any more money through him that we had then exhausted our resources. He was notified to come home for the reasons I have just stated.

The understanding between us was that we were to fully
265 protect Mr. Fellman under any and all circumstances and conditions; that was agreed to by and between all parties heretofore named, Fellman, Kempner, Klein, Seinsheimer and myself. Since the first meeting at Fellman's residence in Galveston in April, 1891 the agreement and understanding was that if we had to go under we were to sell out to Mr. Fellman as had been done by Ross & Russell to Ellis, but at the last moment this was changed. This understanding was by all the parties interested at the time. I

cannot remember exactly what each one said but we agreed on the fact. A very short time before our failure Mr. Fellman took me to task for not coming to his store where I used to go quite frequently. I told him I felt too badly about our affairs, and he asked me to step into Tiernan's place, where we sat down and talked it over. He told me I was a fool to take the matter so to heart. Lots of people had failed before and lots more would fail hereafter. He furthermore said "You need not worry. After I buy you out you can run the business in my name until you get a settlement. If you cannot raise money enough to make the settlement I will see that you get the money to make the settlement with." This is about as I remember the conversation between us. As before stated the agreement was to dispose of the stock by bill of sale. This was Mr. Klein's preference and Mr. Seinsheimer's and mine. It was also agreeable to Mr. Fellman, Mr. Frumbach and Mr. Kempner, but a few days before the deed of trust was made out Mr. Seinsheimer and Mr. Fellman said it would not do, Mr. Fellman especially preferring a trust deed. My conversation with Fellman at Tiernan's place was some days before the failure. I do not remember the date. I have stated all that occurred in that conversation. I remember the signing and making of the second deed of trust to Mr. Sonnentheil. It was made on Sunday morning following our failure. I came to the store on Sunday morning and Mr. Seinsheimer told me Mr. Klein would arrive in a few moments from Dallas. I asked him what for, and he said the deed of trust had two kinds of handwriting and the lawyers thought it looked bad and there might be some trouble. Mr. Levi arrived in the office a few minutes
266 later with another instrument, and in a few moments later Mr. Klein arrived. Mr. Klein went into the inside office with Mr. Levi, and in a little while Mr. Klein opened the door and said "I won't sign this paper. I have signed too damned many already." I asked him what was up and he said he objected to a clause in the document; there was a clause in it authorizing either one of the partners to sign for the others. Mr. Levi said he thought it was all right, he could see nothing wrong with it, and I said I considered it all right, and Mr. Klein turned to me, and said "If you say sign it, I will do so. I will sign anything you say," and he signed it, and I signed it and Mr. Seinsheimer then signed it after me. After the trust deed was made, and before the goods were attached I conversed with Mr. Fellman and told him to buy the goods before there were any attachments levied. I thought there was danger of attachments being run. He said he was not able to buy. He could not make the financial arrangements. I made the request because Mr. Fellman had promised me he would do so and also, as stated because I was afraid that attachments would be run on the stock and it appeared to me from the action and conversation with Mr. Fellman that he courted and in a manner invited such attachment. After the attachment I requested Mr. Fellman to replevy the goods from the United States marshal after attachment had been levied upon them. He answered that it was as good a sale as he cared to make. I made the request because Mr. Fellman had

promised to let us continue the business in his name or some one's else until we could get a settlement. I knew if the stock was not replevied there would be nothing to continue the business, nothing to sell, and without stock to keep up the bar-rooms who owed us large amounts of money I knew there would be a waste and slaughter of our assets, as subsequent events have proved there was. I thought I had a right to demand the replevy of the stock because during all our conversations and all our meetings and confabs, it was always understood and agreed by Mr. Fellman the stock should not go out of our hands, come what may. Our understanding was that we were not to lose our interest in the stock nor in any of the assets of the firm. It was all to revert to us when settle-
267 ment was made. I say so because Mr. Fellman had promised it to us, as I considered in the same spirit that we had promised to protect him. Klein and I together talked to Mr. Fellman and tried to show him the necessity to replevy the stock. We demanded it as a matter of right because we had been promised it. We also tried to show him that the assets would be wasted if it was not done. We had several conversations with Mr. Fellman after Mr. Klein came down from Dallas, and after the stock had been attached. One of them was in Fellman & Grumbach's store. We showed him the necessity of replevying the stock so we could keep on supplying the saloons who owed us large sums of money and who would and could not pay us unless we could so supply them, and he finally agreed to the replevying of the stock, and said he would try to make arrangements, but later he informed us he could not do it and Mr. Sonnentheil informed us he refused to replevy the stock. Finding our pleadings were of no avail Mr. Klein and I called on Mr. Fellman at his rooms at the Tremont hotel and reminded him that he had promised us that we could continue the business, either in his name or in ours and that now there was nothing to sell and nothing to make a settlement with, and we demanded that he set aside the sum of $25,000 in the hands of some third party for the purpose of making a settlement with our creditors. The demand was for the sum of $25,000 to be set aside for the firm for the purpose of making a settlement with our creditors. It was made because it was promised to us that we should be furnished with the means to regain our name through the medium of the stock and other assets of the firm. In response to this demand Mr. Fellman called us all kinds of names, stormed around a good deal and told us he would not be blackmailed and refused to concede anything. Mr. Fellman did not wish his name to appear in the trust deed, and as I understood it, one of the principal reasons was that the business was to be continued in his name in some shape until we could make a settlement. I never did clearly understand why the change was made, and the trust deed was executed instead of conveyance to Fellman of the stock, or of enough of it to secure him against the liabilities he had assumed as endorser,
268 but there was sufficient argument brought to bear at the time to induce me to consent to the change. Our firm didn't quit business and liquidate their affairs when we first discovered

that it was insolvent because at first we tried to recover our lost ground by additional capital and the scaling of a large debt, and later we found we were still in bad shape on account of the demand made by Fellman that we keep up until his own affairs got in shape. On taking stock in 1892 we did not quit business and liquidate our affairs because we could not. In liquidating a business, notes and accounts have to be paid as they mature, or go to protest. Many of our large notes were endorsed by Fellman & Grumbach. They were not able to furnish us the money to pay them with and we surely did not have it, besides it would not have left us in position to secure Fellman if we had taken the proceeds of the business and paid it to the other creditors. The first protest of our paper would have brought on a commercial crisis. Prior to the making of the deed of trust to Sonnentheil, we executed a deed to Mr. Fellman of lands, if I remember it correctly, at the time it was still contemplated to make the transfer by bill of sale. Those deeds were made because Mr. Klein claimed he owed his brother $5,000 from the time he put the additional capital into the business, and I owed $8,000 to Julius Freiberg of Cincinnati from the same cause, and we told Mr. Fellman we would sign no document until this money was repaid. We each received $5,000 cash for which we transferred the land in question to Mr. Fellman, but as far as Mr. Klein and I could find, Seinsheimer was short again in and about the same amount in his cash since the last accounting, February, 1891, and so we considered matters evened up as far as the $10,000 was concerned. At the time of making the transfer of the land I considered it was worth $12,000 to $15,000. As I have stated, Mr. Fellman paid $10,000 for it. This transfer and deed was made in anticipation of a bill of sale or the deed of trust to Sonnentheil. I don't remember whether the change in the instrument had been then determined. Our motive and reason for making the trust deed to Sonnentheil was that Mr. Fellman requested it. He said he had made arrangements with Mr. Sonnentheil to act as trustee.

269 The property transferred to Sonnentheil by the deed of trust I considered at the time of making the deed of trust was worth about $220,000. It was greater than the debts named in the deed of trust, about $75,000 more. I mean when all the assets we transferred got into the hands of the assignee. When the transfer was made, Mr. Grelling made out a list to Mr. Sonnentheil, the trustee, of the merchandise and bills receivable and fixtures and of everything that was turned over to him. I examined the list and noticed some notes were not on the list and I called Mr. Sonnentheil's attention to the fact and told him there were more notes than the list showed. He said, "They were not turned over to me, where are they?" I then asked Mr. Seinsheimer if he had the notes and he said he had. I asked him to turn them over to the trustee and he refused. I then told Mr. Sonnentheil to demand those notes from him. Mr. Sonnentheil said he did not think, as trustee, he had a right to discover assets not turned over to him, and I suggested he had better consult Lawyer Levi. Mr. Sonnentheil consulted Mr. Levi, the lawyer, and then told me that under Levi's

advice he had demanded these notes of Mr. Seinsheimer, who delivered them to him. These notes amounted to about $20,000. Mr. Seinsheimer had abstracted them from the safe, and only returned them when I insisted that the assignee should get them.

As regards the Eckford deed of trust and the claim that Freiberg, Klein & Co. owed Mr. Kempner $5,000, I never could get the matter quite straight in my mind or understand it clearly. To my knowledge we did not owe anything to Mr. Kempner, and in fact he repudiated the deed of trust and would have nothing to do with it. This deed of trust was made at the suggestion of some one, I do not remember who, it may have been the lawyer. It was considered right risky to cover property we had in Dallas county in the deed of trust made to Sonnentheil of Galveston county, and at the time of the making of the deed of trust, I was told by Mr. Seinsheimer that we owed Mr. Kempner $5,000. Later on I discovered this was not the case. We had borrowed $5,000 from Fellman, which later on Fellman claimed he had borrowed from Kempner for us and the deed of trust represented this $5,000, but if Fellman did
270 borrow this $5,000 and paid it back to Kempner then Fellman owed Freiberg, Klein & Co. $5,000 to offset it and the debt to Kempner did not exist. It takes a more expert book-keeper than I am to understand the entries in our books and transactions. This transaction was entered and erased in our books, as well as those of the trustee. It was not known to me that we owed Kempner the $5,000 at the time of making the Eckford deed of trust. From the time of the first meeting at Mr. Fellman's house until we took stock in February, 1892, there was a loss in the business of Freiberg, Klein & Co., but I do not remember how much. We did a business during the years 1891 and 1892 of about $400,000. After making the settlement with Freiberg & Workum, and adding $60,000 to our capital I thought for a while we could pay out, but after my return from Cincinnati I had grave doubts about it.

(To the admission of all of which said testimony of the said Moses Freiberg the plaintiff objected, for the following reasons:

1st. Because it was not shown in the testimony that the beneficiaries in the deed of trust or the trustee Sonnentheil at or before the execution of the deed of trust and the acquisition of rights thereunder had any knowledge whatsoever or notice or was chargeable with notice of the matters testified to by the witness.

2nd. That so far as the transactions and conversations between the witness and Fellman, Freiberg, Kempner, Seinsheimer, Grumbach and Freiberg & Workum are concerned, the witness positively stated in answer to a cross-interrogatory that the beneficiaries had no knowledge whatsoever of such transaction- and conversations, said objections were by the court overruled, and the testimony admitted.

To the action of the court in admitting said testimony and overruling said objection, the plaintiff then and there excepted, and still excepts.) (Exception No. 6.)

Cross-examined by the plaintiff, witness said:

It is a fact that all the claims secured by the deed of trust to Sonnentheil were genuine, *bona fide* claims, representing actual existing and undischarged liabilities of Freiberg, Klein & Co. It is a fact that the claims in favor of A. W. Fly, temporary administrator,
271 amounted to $3,918.11, and Kahn, whose claim amount to $1,598.60 and Adoue & Lobit to the extent of $5,000 of their claim were unsecured at the time of the making of the deed of trust by collaterals, endorsement or otherwise. All of the other claims named in said deed of trust were unsecured at the time of making the deed of trust save and except by the accommodation endorsement of Fellman & Grumbach or L. Fellman. In the spring of 1891 and subsequent to February 1st, 1891, the firm of Freiberg, Klein & Co. scaled their indebtedness to Freiberg & Workum $90,000, and the three members of the firm of Freiberg, Klein & Co. contributed to the capital stock of the firm $60,000 more than they had already invested, thus accomplishing a betterment of the financial condition of the firm to the extent of about $150,000. As the result of the financial reorganization of the firm, the firm was solvent, and had a surplus immediately after placing the additional capital in the business.

It is a further fact that on February 1st, 1892, the firm had a surplus according to the books, but I do not remember the amount.

Asked the question "Is it not a fact that the reorganization of the finances of the firm of Freiberg, Klein & Co. in the spring of 1891 was effected for the purpose of conducting the business of Freiberg, Klein & Co. with a view of paying its debts and making money for its partners?" the witness answered "It was our aim to make money and pull through if we could. It is a fact that the firm continued to transact its business in the regular way until it found it could not go any further and that a deed of trust or assignment was inevitable. It was a fact that the business of Freiberg, Klein & Co. was capable of making a large amount of money during a successful year. We have made as much as $80,000 in one year. It is a further fact that after the reorganization of the finances of the firm in 1891 and continuously thereafter I indulged the hope of one or more prosperous seasons, which, if they transpired, would have practically, if not entirely, liquidated the firm's indebtedness. Up to a short time before the failure of the firm of Freiberg, Klein & Co., it enjoyed a good credit. Up to the spring or year of 1892."

272 Asked "Is it not a fact that the firm of Freiberg, Klein & Co. only purchased such goods, wares and merchandise as were required for the legitimate and natural conduct of their business?" he answered "We did not purchase any more goods than was necessary for the proper running of the business." With the exception of renewing notes due the banks and a few merchandise notes the firm of Freiberg, Klein & Co. paid its liabilities in the usual course of trade up to the time of the failure in December, 1892. I made out the original and mimeograph copies of the list of goods, wares and merchandise taken from the plaintiff, Jacob

Sonnentheil, by the Christian Moerlein Brewing Association under an attachment sued out against the firm of Freiberg, Klein & Co. The exhibit attached to the plaintiff's petition is not before me when I testify. The original and mimeograph copies made by me where filed in the suit and I presume have not been changed, and represents the whole wares and merchandise in controversy in this suit, attached by the United States marshal. It is a fact that the original list from which the mimeograph copy was made was prepared and written by me and it contained a correct list of the goods taken by the marshal under the writ of attachment of the Christian Moerlein Brewing Association. I placed opposite each item in the said list the value of the items respectively. Those values were the reasonable market values of said items at Galveston December 23, 1892, the date of the seizure under the attachment. I was entirely familiar with the reasonable market value of said items at the time and place mentioned.

Asked as follows: "If you have testified in response to any of the direct interrogatories in reference to any conversations or transactions between the firm of Freiberg, Klein & Co. or any of its members and L. Fellman or the firm of Fellman & Grumbach, prior to or at the time of making the deed of trust to Jacob Sonnentheil, is it not the fact that neither Mr. Sonnentheil, the trustee, nor any of the creditors secured in the said deed of trust knew of any of such conversations or transactions," he answered as follows:

"It is a fact as asked me."

273 L. A. GRELLING, witness for defendant-, testified as follows:

I live in Galveston. Am agent of the Christian Moerlein Brewing Company here. Have been such agent for nearly three years. I became their agent six or seven days after Freiberg, Klein & Co. failed. I put in my application for the situation before the seizure of the stock by the marshal in this case and became agent and took charge of the business of the Moerlein Brewing Company on the same day the attachment was run, December 23, 1892. Up to that time I had been with the firm of Freiberg, Klein & Co. nearly six or seven years and was in the employ of Mr. Sonnentheil as trustee from the time of the failure until the date of the levy. I was bookkeeper of Freiberg, Klein & Co., had charge of the books, kept the general books. Was not cashier. Seinsheimer was cashier, kept the cash books. Was the office man, you might say.

(Shown the deed of trust of December 16, 1892, witness said:)

I recognize the names of the persons there indicated as beneficiaries. All of them except Kahn and Fly and Adoue & Lobit, to the extent of $5,000 of their claim had upon their paper the endorsement of Fellman & Grumbach. I do not know who has been paid. I suppose the trustee's books would probably show. I looked after the bank affairs of Freiberg, Klein & Co. on the outside, their money matters, did some borrowing for them. They had their checking account in the year 1892 with the Island City savings bank, but

they borrowed money from several institutions, the Citizens' Loan Company, Adoue & Lobit, the First National bank and the American National bank and private parties. The Irving National Bank of New York did business with them as a foreign account. The bank paper was paid, or extended from time to time as I observed in their business that year. It was about 1887 when they changed their checking account from the Texas Banking and Insurance Company to the Island City savings bank. From that time on they did no business with the Texas Banking and Insurance Company.

They did no other business with the Citizens' Loan Com-
274 pany and Adoue & Lobit, except to borrow money from them. I think at no time after they began doing business with the Island City savings bank did they cease to be debtors of that bank. The paper and debts were extended or renewed because they did not have the money to pay it or needed it for other purposes, or it did not reach around as far as they wanted it to go. Their limit of credit was reduced. I do not know that this was the case at the Island City savings bank. It might have occurred in other places. At the First National bank we were several times requested to reduce our line of credit. At one time during Oppenheimer's administration it was reduced to the extent of $5,000 at the First National bank. We deposited with the Island City savings bank and checked against it. With the other banks we got money from them as we wanted it and could get it. It was about two years before the failure that Oppenheimer requested the reduction of the line of credit at the First National bank. This was the only reduction that was made except perhaps with the Irving National bank. I think they reduced that once $5,000. At the Citizens' Loan Company they owed probably $15,000. At the First National bank, I think the largest amount they ever owed there was $25,000 and it was reduced to $20,000 at that time, afterwards got the $5,000 back again. They owed the Island City some $30,000 on endorsement, but they owed them more money on collateral security. Sometimes we had trouble in getting paper renewed, because the banks claimed they wanted to reduce the loan and give it to somebody else or they owed too much, more than their account justified. If we could not talk them out of it and get the money there we would have to get it somewhere else, generally tried to talk them out of it. I considered Freiberg, Klein & Co. insolvent on December 16, 1892, and for several years before. My knowledge was derived from the general connection with their books, their business and accounts. I think the members of the firm were aware of the status of the business. We always owed the American National bank something. The trust deed represents correctly what they owed to the American National bank.

(Shown the following paper:)

| | | |
|---|---|---|
| 275 | Real estate | $37,399 52 |
| | Stock | 32,425 00 |
| B. R. O. A. and cash | | 221,360 22 |
| Stock, ext | | 110,000 00 |
| | | $391,184 74 |
| Due on notes and O. A | | 182,561 38 |
| | | $208,623 36 |

(In lead pencil on the side of statement—" F., K. & Co., Sept. 29, 1892.")

Witness testified:

That is the statement made to the commercial agency in September, 1892, by Freiberg, Klein & Co., September 29, 1892. We usually made reports in February. This was necessarily a special report, a call report, as they call it, made when a subscriber to the agency has a special desire to learn something of the credit or standing of the merchant who is doing business, and something calls him to ask for a special report, he goes to the commercial agency and asks for such a report, and the agency's duty is to go to that firm and ask for a special report. I should judge this is a call report, not a regular report.

(Defendants offered to read this report to the jury concerning which the witness further testified that said statement was made and handed to him by Seinsheimer, one of said firm, and was taken by the witness to Dun's agency by directions of Seinsheimer, and that the statement was not true, as he (witness) did not think the firm was solvent at the time and the firm went on and bought and sold goods after making said report, buying some from the Christian Moerlein Brewing Company, and that the firm could not have continued business if a true report had been made to the agency.)

(To the reading of which document, and the evidence of said witness in connection therewith the plaintiff objected at the time, for the reason that neither the plaintiff, nor any of the beneficiaries in the deed of trust had been connected with any such representation and that the trustee Sonnentheil, and the beneficiaries
276 in said deed of trust had no knowledge of the same at or before the time their rights vested under the deed of trust made to Sonnentheil by Freiberg, Klein & Co.)

(The court overruled the objection and admitted the evidence to be given to the jury, and to the ruling of the court in that regard, and to the admission of said evidence to the jury over said objection, the plaintiff then and there excepted and still excepts.) (Exception No. 7.)

Witness further testifying, said:

I never kept the beer books. That related to beer entirely. Cannot tell how much beer Freiberg, Klein & Co. got—they were doing a business of three or four car-loads a week to supply their

customary trade. I think they had been dealing with the Moerlein Brewing Company about two years before the failure. No one else handled the Moerlein Brewing Company's goods here. Freiberg, Klein & Co. were their sole agents. The books of Freiberg, Klein & Co. show that in 1892, Freiberg, Klein & Co. purchased merchandise amounting, in July, to $20,343.26; in August, $28,258.69; in September, $25,554.44; October, $15,946.96; November, $23,535.67; December, $16,232.22; total, $129,971.24. These purchases were made for their business, but do not embrace beer.

(Witness here shown the following paper:

Moses Freiberg. Samuel Klein. Joe Seinsheimer.

Freiberg, Klein & Co.

FEBRUARY 13TH, 1892, GALVESTON, TEXAS.

| | | |
|---|---|---|
| Real estate | $39,184 11 | |
| Merchandise, stock here and in bond | 98,029 14 | |
| Bills receivable, open account and cash | 238,190 01 | |
| Stocks | 32,425 00 | |
| | | $407,828 26 |
| Liabilities: | | |
| Open account and bills payable | | 206,840 84 |
| Showing net worth of | | $200,987 42 |

concerning which the witness testified:)

277 I should judge this is a regular report, dated February 13, 1892, showing a surplus of $200,987.42. That surplus is not true. It is not the truth that there was a surplus on that day. I considered the firm insolvent then. This paper seems to be a copy from the mercantile agency in the form in which they keep these reports. When they receive a report they copy them and paste them on these boards, and file them away, and subsequent reports are pasted on the board beneath, so they keep a full line. This is a copy of that report.

(The plaintiff objected to the introduction of said document in evidence, and the admission of said testimony in reference thereto by the witness for the reason that neither the plaintiff nor any of the beneficiaries under the deed of trust had been connected with any such representations and none of them had any knowledge or notice thereof at or before the time of the execution of the deed of trust under which plaintiff claims, and the vesting of the rights in plaintiff and in said beneficiaries under said deed of trust, and further because the paper offered in evidence was a mere copy from the books and papers of Dun's agency and the books and papers themselves were better evidence.)

(The court overruled the objection and admitted the documents and testimony in evidence and to the ruling of the court, and to the admission of said evidence the plaintiff then and there excepted, and still excepts.) (Exception No. 8.)

(Shown the following document:)

Freiberg, Klein & Co., whol. liq. & cigars, Galveston, Texas, Galveston Co.

10-6477 March 14th, 1891. They furnish us the following figures showing their assets and liabilities, February 1st, 1891.

*Assets.*

| | |
|---|---|
| Stock | $26,150 25 |
| Real estate | 49,780 15 |
| Merchandise, Galveston | 69,309 07 |
| Merchandise in bond | 90,223 01 |
| B. R. & O. A. | 200,684 08 |
| | $436,146 57 |

278 *Liabilities.*

| | |
|---|---|
| O. A. & B. R. | $226,988 78 |
| M. F. S. K. & J. S. stocks acc't | 209,157 79 |
| | $436,146 57 |

Witness testified:

That is a report, I should judge, or a copy. This seems to be a copy from the mercantile agency. The property of the mercantile agency I should judge. That is the form in which they keep their records. When they receive a report of that kind they copy them and paste them on these boards and file them away and any subsequent reports I think they paste them on these boards right underneath and so keep a full line of them. I should judge that this report here is copied in on that sheet. That is the document which I am testifying about.

(Defendants offered the document in evidence. Plaintiff objected to the admission of the same in evidence because it was not shown that the plaintiff or any of the beneficiaries in the deed of trust of December 16, 1892, had any knowledge of or connection with the said document at or before the time of the acquisition of rights of said beneficiaries under said deed of trust, and because further, the said document is not properly authenticated and verified, and because the witness simply thinks it is a copy of the original, and because it is confessedly a copy of the original, and the original is not accounted for nor produced. All of which objections were overruled by the court and the said document was permitted to be read in evidence, and to the action of the court in overruling said objection and admitting said document in evidence, the plaintiff then and there excepted, and still excepts.) (Exception No. 9.)

Witness resuming said:

The balance here shown of the assets over the liabilities is $209,157.79. This is false. I considered them insolvent at that time. I know of the settlement that was made of the debt with Freiberg & Workum by Freiberg, Klein & Co. It was in the latter

part of 1890 or spring of 1891, I am not sure as to the exact date.
They owed Freiberg & Workum, a firm in Cincinnati, from
279 $220,000 to $230,000 and they compromised that with them
for about $110 to $120,000. They compromised the account on that basis. In other words, they paid $110, or $120,000 in satisfaction of the $220 or $230,000 which they owed Freiberg & Workum. They were supposed to put in $20,000 each in the business. Mr. Klein fell short of his by $2,500, I think he put in $17,500. Freiburg put in $20,000 and Mr. Seinsheimer put in $20,000, making $60,000. The difference between this $60,000 and the $120,000 paid to Freiberg & Workum was made up by stocks, whiskey certificates and collaterals, and so forth. About $40,000 of it was whiskey. The whiskey so used belonged to their assets, were principally in bond. I think all was in bond, and was represented by whiskey certificates. The additional capital went into the business, was paid to Freiberg & Workum, and increased the personal accounts of Moses Freiberg and Seinsheimer and Klein to that amount, and reduced their indebtedness to that amount, giving them a profit of over $100,000 on the transaction. It was put in for the purpose of decreasing the indebtedness of Freiberg, Klein & Co. to Freiberg & Workum, and of course never went into the business. It only served the purpose to reduce the old debt so as to make up the $120,000 they were giving Freiberg & Workum in liquidation of their indebtedness of 200 and odd thousand dollars, and make a profit appear on their books. Seinsheimer sold his home to make his contribution to the $60,000. I don't know who he sold the house to but the books showed his contribution of that much, $20,000. The use of goods to pay the debt of Freiberg & Workum reduced the stock of Freiberg, Klein & Co. They took those goods out of their business and naturally that reduced their stock.

Cross-examined witness testified:

Moses Freiberg I have heard is in Cincinnati. I do not know where Sam. Klein is. Seinsheimer is in Galveston connected as an employee with the firm of H. Kempner now. The members of the firm of Freiberg, Klein & Co. are not engage- in business together, nor any two of them, and have not been since their failure. All
of the debts secured in the deed of trust to Sonnentheil was
280 accommodation paper, that is all of it that was endorsed by Fellman & Grumbach.

They got no money for the endorsement that I know of. I would have known it had they received any money for such endorsement. I have been in charge of the Moerlein Brewing Co.'s interests here ever since taking charge a few days after the failure of Freiberg, Klein & Co. The Moerlein Brewing Company used the mules and wagons that were levied on by the marshal from the time of the seizure continuously thereafter, even before the sale which took place February 23, 1893. During the interval between the seizure and sale the Moerlein Brewing Company used all the live and rolling stock connected with the beer business. Same was purchased

at the sale by the attorney representing the Moerlein Brewing Company, bought for the Moerlein Brewing Company. At what price I do not know. I think Mr. Freiberg's valuation of the articles of this live and rolling stock in the Exhibit A to the plaintiff's petition in some instances *are* a little extreme. The two gray horses "Prince" and "Homer" put down in exhibit at $400 I think were worth about $300. One gray horse Joe put down at $150 I think was worth about $50 to $60 at that time. The bay mare Nelly put down at $75 I think was worth $50. Two large mules put down at $500 I think were worth $400. The large black and Alphonse put down at $400 I think were worth that amount at that time. Two small gray mules put down at $150 and Ginger $125, Kate $175, I think were about right. Lula and Jack put down at $500 I think were worth about $400. I have no idea what the float was worth. One large float, $200, I do not know the value of. Double wagon and springs, $100. Two buggies $125, cart $75, seven sets double harness $140, and two sets single harness $30, I think are about the correct values. One set of buggy harness $30 I think was excessive, that was my opinion of it. I am speaking simply from memory. I had all these things until we disposed of them, not all of them. I do not think I had all those things. Other parties purchased some of those things that were in the yard after the auction. Before the auction I had them all. I do not know of any money paid by Freiberg, Klein & Co. to Fellman & Grumbach to
281 meet the endorsement made by Fellman & Grumbach by way of accommodation for Freiberg, Klein & Co. I would have known it had it been paid. I was the book-keeper for them for years prior to their failure. Outside of one transaction in reference to the notes of Walker, Freiberg, Klein & Co. never paid Fellman & Grumbach any value to meet any paper on which Fellman & Grumbach were endorsers, nor secured them against liability for such endorsement by collateral or otherwise. I have stated that the statements made to the commercial agency were prepared by Mr. Seinsheimer. I am not prepared to say that Mr. Freiberg did not have something to do with it. I know Freiberg's handwriting and can recognize figures made by him.

(Shown document as follows:)

| | | |
|---|---|---|
| $37,399 52 | R. E. | |
| 110,000 00 | Stock est. | |
| 32,425 00 | Stocks | $182,561 38 |
| 211,360 22 | B. R. O. A. &c. | 208,623 36 |
| $391,184 74 | | $391,184 74 |

Witness testified:

Those figures are Mr. Freiberg's. The words are in Mr. Seinsheimer's handwriting. These figures correspond with the statement of September 29, 1892. The figures are Freiberg's and the handwriting is Seinsheimer's.

(Plaintiff read said document in evidence.)

Witness resuming, said:

In 1891, when the partners of Freiberg, Klein & Co. contributed $60,000 to the capital and scaled their indebtedness to Freiberg & Workum to the extent of $90 or $100,000, they operated a betterment of the firm's finances to the amount of $150,000 or $160,000. The $60,000 which shows in the capital only, and the $100,000 would operate in the general condition of the business as against the condition at that time. I do not remember in round figures the condition of the business prior to that reorganization. I considered them insolvent, but to what extent I did not know. If there was a deficit of $75,000 when they had scaled their indebtedness
282 $100,000 and paid nothing for it, and added $60,000 to the capital and the proper entries were made to reflect these transactions, it would show that the firm had a surplus of over $75 or $85,000 instead of a deficit of $75,000, that is, if such was the condition of the firm at that time. They reduced their liabilities $100,000 and increased their assets $60,000. During the summer the purchases of Freiberg, Klein & Co. were not generally as great as they were in the fall. The purchases in the fall months, in other words, exceeded those made in the summer. I do not think the purchases during the fall of 1892 differed materially from those in the fall of 1891. The gross sales of Freiberg, Klein & Co. for a number of years ran between $350,000 and $400,000. The ordinary run of these purchases in order to do that volmue of business would be about $25,000 a month. They generally carried about $110,000 to $115,000. Of course, the only time we could determine what stock they had would be on the first of February when they closed their accounts. I think their stock then averaged about $110 to $115,000. At the date of their failure it was not so much as this by a great deal. That was in the fall of the year during their best business month, December. I do not know that their stock was unusually large at the time of their failure. The amount of goods they bought before that was not extraordinarily large. Sonnentheil employed me after the failure to work for him as book-keeper and I quit myself after the seizure. He paid me for the time I served. The one item in which I stated that money had been paid by Fellman or Fellman & Grumbach against endorsement of others, was in reference to the notes of S. A. Walker. Freiberg, Klein & Co. borrowed $20,000 and gave four notes of $5,000 each, running 60 and 90 days, four and five months. The money from one of those notes went into the business. The other $15,000 was put in the hands of either Mr. Fellman or Mr. Kempner, as I understand it, and held in abeyance for them if they should need it at any time. I do not know that only $5,000 went into the hands of Fellman. The name in the bills-payable book was left blank in the case of the Walker notes. I did not know what name was to be entered there until after the failure. The name was blank
283 in the bills-payable book and I think was entered in the cash book and shortly before the failure the amount of $10,000 of that amount was transferred—was charged off. They were owing at that time Mr. Kempner $15,000 and I think $10,000 was charged

off from bills payable and credited to bills receivable which left an asset of $5,000 on bills receivable, and $5,000 still owing to Mr. Kempner. My recollection is that $10,000 of that went to pay Mr. Kempner, which left still them owing Kempner $5,000. Fellman & Grumbach were endorsers on the Kempner note. There was $5,000 standing on the books charged against Fellman and Fellman & Grumbach. I gave Mr. Sonnentheil a memorandum of that when I was his book-keeper so he made the entries in his book that Fellman and Grumbach owed Freiberg, Klein & Co. $5,000 and that the $5,000 due Kempner on the notes was a liability. That was to say $5,000 out of the Walker fund. I do not think that Freiberg, Klein & Co. owed Kempner any other notes. I do not know what became of the $5,000. As a fact, at the time of the failure my recollection is that Freiberg, Klein & Co. did owe Kempner $5,000 endorsed by Fellman & Grumbach. I do not remember what the Moerlein Brewing Company paid for the mules and wagons at the marshal's sale. I don't think they paid as much as they are listed at in Exhibit A to plaintiff's petition. Could not tell for certain. Freiberg, Klein & Co. usually bought on a credit. They had many customers that bought the bulk of their goods from them. It was necessary in the conduct of their business before the failure to extend credit to their customers in order to collect what their customers owed them, that is, they had to keep them up; in many instances in dealing with that class of trade if credit is withdrawn from them they cannot go on in their business in a great many instances, and would be unable to pay what they owed. As a rule, I think, the notes of Fellman & Grumbach that would be endorsed by them, the notes that were preferred in the deed of trust Freiberg, Klein & Co. got the money on and that money went into their business and paid their debts.

284 Re-examined by counsel for defendant-, witness said:

The marshal turned over to me the wagons, horses, mules &c., that we had possession and use of between the date of the levy and the date of the sale of the property,—turned them over to me to take care of, and to use. I was to provide for them and use them until the sale, and I did so. They were produced at the sale for the purposes of sale, and were there sold and we (the Moerlein Brewing Company) bought some of them, not all. What I said about the betterment of Freiberg, Klein & Co.'s condition so as to change from $75,000 deficit to $75,000 surplus was simply as an illustration of the situation. Had there been a deficit of only $75,000 before the increase of the capital and the scaling of the debt of Freiberg & Workum, just after the scaling of the debt and the contribution of the capital the surplus would have been $75,000.

E. H. Gorse, examined for defendant-, testified by deposition:

My name is E. H. Gorse, age 36 years, reside in Chicago, Ill. In 1891 and 1892 I resided in Galveston, Texas, and was manager there for R. G. Dun & Co. Was acquainted with the firm of Freiberg, Klein & Co., and made reports and ratings of said firm. The firm

was composed of Moses Freiberg, Sam. Klein and Joseph Seinsheimer, so far as my knowledge was concerned, and it was rated as to capital between $100 and $200,000. They made statements in 1892 as shown in Exhibit A upon the dates named.

They made statement in 1892 as follows:

285 Moses Freiberg .Samuel Klein. Joe Seinsheimer.

Freiberg, Klein & Co.

FEBRUARY 13TH, 1892, GALVESTON, TEX.

| | | |
|---|---|---|
| Real estate | $39,184 11 | |
| Merchandise, stock here and in bond | 98,029 14 | |
| Bills receivable, open account and cash | 283,190 01 | |
| Stocks | 32,425 00 | |
| | | $407,828 26 |
| Liabilities: | | |
| Open account and bills payable | | 206,840 84 |
| Showing net worth of | | $200,987 42 |

Said statement was made upon the day named therein. Don't know where original statement is, presume it is in the office of R. G. Dun & Co., at Galveston. Statement was made by L. A. Grelling at the instance of Joseph Seinshiemer. If my memory serves me the above statement is a correct copy of the statement made to my agency by the firm of Freiberg, Klein & Co. on the date it purports to have been made, and the original was made in the handwriting of L. A. Grelling and delivered by him to me. The statement shows the assets to have been $407,828.26 and liabilities $206,840.84. They made another statement September 29, 1892. L. A. Grelling made the statement at the instance of Joseph Seinsheimer. The statement was rendered after a request on my part, as I had information from other sources that the firm was in a shaky condition and their credit suffering. I called upon them for an honest statement so that I could verify the rumors about them or deny them, if they were false. I expected them to make an honest showing, and regret that I believed at the time that it was an honest showing. I presume the original is now in the office of R. G. Dunn & Co., at Galveston. The following is a substantial copy of the statement made on that date, September 29, 1892:

286 Moses Freiberg. Samuel Klein. Joe Seinsheimer.

Freiberg, Klein & Co.

SEPTEMBER 20, 1892, GALVESTON, TEXAS.

| | | |
|---|---|---|
| Real estate | $37,399 52 | |
| Stocks | 32,425 00 | |
| B. R. O. account and cash | 211,360 22 | |
| Stock estimated | 110,000 00 | |
| | | $391,184 74 |
| Due on notes and open acc't | | 182,561 38 |
| Showing net worth of | | $208,623 36 |

Said statement showed assets of $391,184.74, and liabilities of $182,561.38. The rate as given by my agency upon said statement was, as before, $100 to $200,000. Large firms were asked for statements once a year. I asked for an additional statement from this firm for the reason above stated, that I had information from other sources that they were shaky and their credit suffering. The firm credit was becoming a matter of concern in mercantile circles, and it became necessary for me to inquire more thoroughly into their financial condition. I therefore asked for a statement, and while I might have questioned the value of all the assets stated, I regarded these figures as showing a healthful financial condition, provided their representation as to liabilities was correct. Rumors were afloat that they were slow in payments, owing largely to banks and individuals, credit refused them in some quarters, and generally that their business was not healthful. Inquiries as to the financial standing of the firm came from northern and eastern cities, local banks and firms. There were rumors in Galveston general in their character and discussed among brokers, bankers and merchants. These rumors affected me to the extent of desiring to post myself as to the foundation for them, and I made inquiries generally with somewhat unsuccessful result as Seinsheimer and Grelling misrepresented the financial condition of the firm and banks were not willing to tell the truth about the firm affairs in so far as
287 related to the banks. The rumors referred to and the nature and character of which I have stated, were certainly of sufficient importance to suggest a most rigid investigation by interested parties.

Attached to the interrogatories upon which witness was examined is the following Exhibit C:

Freiberg, Klein & Co., wholesale liquors and cigars.

GALVESTON, TEXAS, GALVESTON COUNTY, *March* 14, 1891.

| | | |
|---|---|---|
| Assets, stock | $28,150 25 | |
| Real estate | 49,780 15 | |
| Merchandise, Galveston | 69,309 07 | |
| Merchandise in bond | 90,223 01 | |
| Bills payable and open accounts | 200,684 09 | |
| Total | | $436,146 57 |
| Mose Freiberg, Sam. Klein and Joseph Seinsheimer stocks, acc'ts, which is net worth | | $226,988 78 |

And concerning the same he was asked in interrogatory 10 "What statement, if any, was made by said Freiberg, Klein & Co. about February 1, 1891? Examine the statement herewith attached marked Exhibit C and state whether the same is a true or substantial copy of a statement made to your agency by Freiberg, Klein & Co. and if yea, by whom and at whose instance said statement was made," to which the witness answered:

The copy Exhibit C is, I believe, a copy of the statement made February 1st, 1891. My recollection is that this was also furnished by Grelling at the instance of Seinsheimer.

Cross-examined witness testified:

I left Galveston about July 1, 1894.

Asked: "Did the defendants in this suit, or any of their
288 attorneys know of your removal from Galveston? If so how long and when did they become aware of that fact?"

He answered: I cannot speak for the defendants. Their attorneys, Lovejoy & Sampson did not know of my removal from Galveston. They knew I had left there, but at the time expected me to return. I have, however, advised them since I came to Chicago that I am not likely to remain here. My letter to them that contained this information was a personal one entirely and related exclusively to my own personal affairs.

Resuming generally, he said: "I regret to say that I was well known in Galveston, in fact had entirely too many acquaintances. I was well known to counsel for defendants. It is and was immaterial to me whether the majority of my acquaintances in Galveston knew of my removal or not. Regarding the statement made by Freiberg & Co. to R. G. Dun & Co. during the month of February, 1892, concerning which I have testified I cannot say whether the original is in existence or not. I have exhibited it in court on previous occasions, and this question to me is entirely superfluous. The statement was in existence and is yet unless it has been destroyed. You (counsel for plaintiff) should be able to get this information at the office of Dun's agency in Galveston. I arrived at the rating from statements rendered and outside information as well."

Asked in cross-interrogatory: "If you say in answer to interrogatory No. 8 that rumors were afloat concerning the financial condition of Freiberg, Klein & Co. about September 18, 1892, state what rumors they were, where you heard them, through whom you heard them, etc., giving in detail the time, place and circumstances thereof," the witness answered:

I have already stated what the rumors were. It would be a breach of faith to comply with your request to state where I heard them, through whom, etc.

Asked, "Was it not your business to investigate rumors of this kind, to know whence they emanated and what was the basis thereof?" he answered:

It was my business if I desired to make it such.

289 Asked, "Were you not by reason of that fact likely to have a memorandum or recollection of the origin of the rumors or rumor as they came in to you?" he answered—yes.

(To the introduction of said depositions in evidence and the several parts thereof, the plaintiff made the following objection—To so much of said depositions as related to statements made by or for Freiberg, Klein & Co. to the agency of R. G. Dun & Co., because, first, the matters testified to were not shown to have been known to or in anywise connected with the trustee, Jacob Sonnentheil, or the

beneficiaries under the deed of trust of December 16, 1892, at or before the acquisition of the rights of said beneficiaries under said deed of trust. Second, because the said testimony related to and embraced copies of original documents not shown to have been lost and not produced, or otherwise accounted for, and which were better evidence than the copies offered, and to so much of said depositions as had reference to rumors current about the insolvency or financial weakness of Freiberg, Klein & Co., and the sufficiency of such rumors to induce critical investigation on the part of persons interested, because, first, said testimony was as to conclusions formed by the witness, and not as to particulars of fact upon which the jury should form its own conclusions as to the sufficiency of such rumors to induce such investigation. Second, because said witness on cross-examination refused to give the particulars of such rumors so as to enable the jury to form their own conclusions thereon. And to all of said depositions in so far as they related to rumors concerning the financial standing and ability of Freiberg, Klein & Co., because the witness, when interrogated on cross-examination particularly with reference to the said rumors and to their origin and his source of information in that regard as shown in said cross-interrogatory 6 refused to answer in respect thereof, or to give the particular facts which the interrogatory called for.)

In answer to the objection, counsel for defendants thereupon offered in evidence the original of the commercial agency report of September 29, 1892, copy of which said witness testified to in his depositions, which is as follows:

290 Moses Freiberg. Samuel Klein. Joe Seinsheimer.

Freiberg, Klein & Co.

They hand us the following statement showing their financial condition:

SEPTEMBER 29TH 1892, GALVESTON, TEXAS.

| | | |
|---|---|---|
| Real estate | $37,399 52 | |
| Stocks | 32,425 00 | |
| B. R. O. account and cash | 211,360 22 | |
| Stock, estimated | 110,000 00 | |
| | | $391,184 74 |
| Due on notes and open account | | 182,561 38 |
| Surplus | | $208,623 36 |

As will be shown from the above their figures of the stock are estimated. We are informed the amount of their liabilities $125,000 is held by local banks. This is largely secured by the indorsement of Mr. L. Fellman, a member of the firm of Fellman & Grumbach, retail dry-goods merchants in this city, a man who is regarded as perfectly responsible for his obligations. They have also turned over to the banks a considerable amount of their bills receivable and bonds and stocks and collateral securities. They do not apparently make any effort to reduce their heavy liabilities in Galveston

and still have a large amount of money outstanding from time to time. Still their condition appears entirely favorable, and their statement shows that they are apparently prosperous, yet there is some criticism upon their business methods. Of course, their figures are not disputed, still at the same time, there are those here who discount their receivables, consider and estimate them worth considerably less than they themselves quote. We cannot learn that they have been at all satisfactory in their settlements.

K-700. Rate C plus I.

Thereupon the court overruled all the objections of the plaintiff and admitted the testimony of the said witness and the documents concerning which he testified to be read to the jury notwithstanding, and to the admission of said testimony and the overruling
291 of his objections thereto by the court, plaintiff then and there excepted and still excepts. (Exception No. 10.)

LOUIS WERNER, witness for defendant-, testified:

I am agent of the Christian Moerlein Brewing Co. Live in Cincinnati. Freiberg, Klein & Co. did business with the brewing company three years up to the time of their failure, continuously in beer. The Moerlein Company made beer and Freiberg, Klein & Co. sold it. They handled probably 12, 15 or 16 cars per month some seasons. It depended on the season; 15 cars a month was a fair average. In our earlier dealings we put in larger amounts, but for the last few years or so we put in about 60 barrels to the car. The value per car-load was about $450 for 60 barrels. In the fall of 1892 we had information that led us to make inquiries concerning the financial condition of Freiberg, Klein & Co. They owed us quite a large amount of money and we heard bad rumors about them and wanted to satisfy ourselves whether they were all right or not. I went to Dun and Bradstreet and told them we had unfavorable opinions about them and wanted special reports. We were supplying them with goods and were interested in knowing their true condition with reference to future transactions as well as with reference to what they owed us at the time.

The Moerlein Brewing Company subscribe to the agencies and get the reports.

(Shown paper witness stated it was a statement he got on inquiry at that time from Dun's agency.) After having heard these rumors, and having these reports we thought the rumors were unfounded and that Freiberg, Klein & Co. were all right. They failed on the 16th. I left home on the 17th, got to Galveston about the 19th or 20th. When I arrived I went to Freiberg, Klein & Co. to see how matters stood. I had been to their store before they failed, knew where it was. When I got to the office on this occasion Mr. Seinsheimer and Mr. Freiberg were there. Grelling and Covert and Lucas—I forget all who were there. I was acquainted with these gentlemen before. When I first called Mr. Sonnentheil was not there. I was in there once or twice. I met Mr. Sonnentheil,
292 I think the afternoon of the day I got there or the next day, I do not know which, at the office of Freiberg, Klein & Co.

It was then I made his acquaintance. I did not know him before. Either Seinsheimer or Freiberg made me acquainted with him. He was introduced to me as the trustee. Either the afternoon I arrived in Galveston or the next day—I don't remember.

In answer to interrogation by counsel for defendants witness stated that he had interview with Freiberg in the morning of the day he got here and wanted to know how matters stood. He said they were working at the books, he could not tell then, but in a day or so he could tell. On witness' second interview, Freiberg said he could not give any statement in that short time, it would probably take until the first of the next month. He told me he would like to run the Christian Moerlein brewing agency in Galveston on a salary, sell beer for them.

Continuing witness said: He mentioned it in that way, after they got a settlement with us they would go right ahead, the beer would not change hands at all, would go right to the same customers, and that Freiberg and Seinsheimer stated to witness that they were in such shape they could not go on any longer and had to fail because they were broke.

(To this testimony of the witness relating to these interviews with Freiberg and Seinsheimer, counsel for plaintiff objected at the time, because the same was subsequent to the execution and taking effect of the deed of trust, and not shown to be known to or assented to by the trustee or any of the beneficiaries in the trust deed of December 16, 1892, and was hearsay, and *res inter alios acta* and incompetent to affect any of the rights of the trustee or any of the beneficiaries in the said deed of trust. The court overrules the objection and admitted the testimony notwithstanding, and to the admission of said testimony and the overruling of his objection by the court plaintiff then and there excepted and still excepts.)

(Exception No. 11.)

Cross-examined witness stated:

14 cars a month valued at $450 each, would amount to $6,300 a month. The business for three years at this rate would
293 make the volume transacted with Freiberg, Klein & Co. by the Christian Moerlein Brewing Company $227,000.00. It was in the neighborhood of $75,000 a year for three years. When they failed Freiberg, Klein & Co. owed the Brewing association about $28,000. They paid for all the other beer they bought from us during those three years' business. The Moerlein Brewing Company is a corporation under the laws of Ohio, quite a large concern, has a capital of one million dollars. I spent some time in Galveston before the attachment was run. I was engaged exclusively in the matter of collecting the Moerlein Brewing Company's claim. I made the affidavit for the attachment to the effect that Freiberg, Klein & Co. had disposed of their property with intent to defraud their creditors. My warrant for making that affidavit was taking these reports into consideration, and I learned after getting here that they had secured banks which had already been secured. That

I thought was sufficient to make the affidavit upon. The transfer which I had reference to was the deed of trust to Sonnentheil, dated December 16, 1892. With reference to the rumors we heard in the fall of 1892 prior to obtaining the report of September 29, 1892, we got a letter from our agent in New Orleans that certain travelling men had told him that Freiberg, Klein & Co. had been refused credit, and that things looked kind of squally, and for us to look out. That was the substance of the letter. We got other information. After getting the report from Dun and Bradstreet we were satisfied and continued to sell them goods thereafter. I went with the deputy marshal at the time the levy was made to see him make the levy. I did not personally attend at the sale of the goods, was not here at the time. When I reached Galveston after the failure, I knew that the trust deed had been made to Sonnentheil, having seen it in the papers on my way down to Galveston, and knew it when I went to see Freiberg and Seinsheimer at the store, before the attachment. I think I glanced over the trust deed myself in the office of Mr. Lovejoy. I don't know whether it was a copy or the original. We kept shipping beer up to the time we heard of the failure. Five or six cars shipped a few days before had not reached here, and they were turned over to us from the dock.

294 I did not myself make any claim. It was turned over to the Christian Moerlein Brewing Company voluntarily, without any trouble. There was some beer attached along with other things, probably a car and a half, whatever was in the refrigerator, beer that the Moerlein Brewing Co. had shipped to Freiberg, Klein & Co., who handled nothing but Moerlein's beer. The beer which was attached had been sold by the Moerlein Brewing Company to Freiberg, Klein & Co. on a credit, and we attached it. We sold it to the customers around town here, Freiberg, Klein & Co.'s old trade before the marshal's sale. Grelling made arrangements with the deputy to let him have it, and he would be responsible for it. He would pay for it afterwards. The evening of the failure of Freiberg, Klein & Co. we heard the news. I got into Cincinnati the same evening and was told to pack up my valise and come to Galveston, that Freiberg, Klein & Co. had gone up. The Moerlein Brewing Company had some correspondence with Scott, Levi & Smith relative to the beer which had been shipped to Freiberg, Klein & Co., but not delivered at the time of their failure. The receipt of the beer here by Freiberg, Klein & Co., had been voluntarily refused, and it was held for the account of the Moerlein Brewing Company, and they got it without any trouble or legal steps.

Defendants read in evidence the following figures from the report of sales of attached property by the marshal in the suit of The Christian Moerlein Brewing Co. *vs.* Freiberg, Klein & Co., No. 1693 in the United States court in Galveston.

Total sales, $51,258.16. Of this amount there was sold on February 3, 4 and 6, '93, $49,013.72. The balance was sold on March 6, '93.

It was proven on the part of plaintiff that on December 23, 1892,

in the United States circuit court at Galveston, the Christian Moerlein Brewing Company filed an affidavit for writ of garnishment to secure the debt sued for in said cause No. 1693 against Freiberg, Klein & Co., the garnishee being J. Sonnentheil, plaintiff in this suit, and said writ of garnishment being issued to secure the same debt that the judgment was issued in said cause No. 1693 to
295 secure, and said writ of garnishment was served on J. Sonnentheil on December 23, 1892, and thereafter the garnishee made answer to said writ of garnishment, but the plaintiffs on the 28th of February, 1894, moved to dismiss the writ of garnishment and an order of court was made to that effect, the garnishnee not objecting.

LOUIS SCHNEIDER, witness for defendant-, testified as follows:

I live in Galveston. Am in the wholesale liquor business, cigars, wines, etc. I am a member of the firm of George Schneider & Co. Have been in the business since 1871 as a member of the firm. Have been with the firm since it was opened in 1865. I remember the attachment of the stock of Freiberg, Klein & Co. Dec. 23, 1892, and the sale of that stock of goods by the marshal some time in February. I looked over some of the stock. They were the class of goods I handled in my business. In whiskies the market was then a little higher than in December. The other goods were about of the same value. Whiskey was the only article likely to fluctuate. I bought some spirits at the sale, nothing else, some 2c. or 3c. per gallon less than the market price on that day. The market price of spirits during the latter part of December was the same as at the time of sale, if I remember rightly. Some few goods had gone up 5 to 10 to 15c. a gallon. By spirits I mean unrefined alcohol. 't is a staple article, no more staple article in my line. At the sale it brought 2 or 3c. below the market price, by which I mean that much below what it sold for at the distillery. I also saved the freight on these goods to Galveston. By value I do not mean the market value or wholesale selling price here but the market value at the distillery. The only advance in liquor between December and February 1893 was in whiskies. That advance applied as well to Galveston as anywhere else.

CORNELIUS SAMPSON, witness for defendants, testified:

In December, 1892, I was in the merchandise brokerage business, and in the same in February, 1893, selling liquors and
296 groceries of different descriptions. On December 23, 1892, high wines were worth about $1.15 per gallon. Whiskey sold higher than that, of course. Cost price is what they usually do make whiskey at. The market value in Galveston of high wines, spirits and whiskey of the 3rd, 4th and 6th of February, 1893, were about the same as they were in December, except two or three cents higher, about two cents is my recollection. I have reference to the market value in Galveston at that time.

Cross-examined the witness testified:

When I say market value, I mean just what the goods are worth

here in Galveston, or at the distillery. Of course, it costs something to freight them here. My understanding of the market value and what I mean by market value is what I could buy the goods for at the distillery and have them brought here.

JAMES MOORE, witness for defendant-, testified:

I reside in Galveston. Am a member of the firm of Moore, McKinney & Co. and have been engaged in the wholesale grocery business for some 13 or 14 years. Am familiar with the value of such stock as Freiberg, Klein & Co. carried. We carried similar goods. I was present at the time Freiberg, Klein & Co.'s stock was sold by the marshal and saw the goods sold at auction, examined the goods and their character, knew their market value, was at the sale frequently, bought a few goods there. I thought the goods brought their full value. In a good many instances we could buy new goods for less than they brought. Sometimes we would get a bargain, but sometimes they went to their full value and above. I was not there during the entire sale, but almost every day McKinney or I would be there. I was there during the entire sale, perhaps a half a dozen times.

Cross-examined witness said:

Went there to buy bargains. We were replenishing our stock, needed some goods, and bought a few. I reckon there were
297 25 wholesale dealers from different parts of the State there to buy. We only bought what we needed and what we considered a bargain. In speaking of the fair prices that the goods brought I mean what they would have brought laid down in Galveston originally, cost and freight. I am not referring to selling values, but what we could buy them at for cash.

H. C. LANGE, witness for defendants, testified:

I am a member of the firm of Focke, Wilkens & Lange, doing a wholesale grocery and liquor business, and cotton factors and foreign exchange and commission business in Galveston, have been connected with them for about 12 years. Have been in the business since 1866. Am to some extent familiar with the value of such goods as Freiberg, Klein & Co. had in their stock. I am acquainted with all the goods they handled, including whiskey. Some of the goods they kept in stock I did not know, but I did know whiskey. I attended the marshal's sale on three days, that is three occasions. The first day I was a little late, but I was there about three hours and the next two days was there about the same time in the forenoon and afternoon. I told Mr. Wilkens there was a possibility of making some bargains at that sale and I would go down and attend it. I went there and took a memorandum with me and I came to the conclusion there were no bargains as far as we were concerned, that the prices that the goods brought were beyond any speculation, in other words we thought brought good prices. We could order goods direct from the distillery and the differences were too small for us to make any investment. I did not think they brought the full prices, there was a small difference, the difference was too small

for us to tackle them. It did not pay us to buy here because the difference was too small. I have reference now to whiskies. I know nothing about cigars, nor what they sold for. My testimony relates to whiskies, flasks, demijohns, and things of that sort. The sale was largely attended. Competition was heavy and the effect was that they bid up goods very high. I thought I struck two bargains, did not find that I was mistaken, noticed quite an amount of flasks there. There was a bid made on those flasks by
298 Henke of Houston, the first lot that was offered, and I bid up to a certain amount and it went beyond my estimate and I let them go. Mr. Ullman stated to Henke he would be willing to sell him some flasks at that price, and let him make a profit on them. That is his bid and not mine. They put up another lot, which I purchased. We needed the goods and made about 10 % on them. I next purchased some jugs which I presume as far as I recollect, we saved 10 % on. The next lot of jugs were bid up by Davis, Rosenberger & Levy and run beyond my limit. These were empty jugs. I bought them for less than you could lay them down here for. My recollection is we saved about 10 % by buying the jugs instead of ordering them from abroad. The amount was nominal, probably 150 or 200 jugs, the value of which was about 9c. apiece.

L. S. McKINNEY, witness for defendant-, testified:

I am a member of the firm of Moore, McKinney & Co., wholesale grocers in Galveston. Have been engaged in the business for myself about 15 years and was clerk seven or eight years in an office, all in Galveston. I remember the marshal's sale of Freiberg, Klein & Co.'s stock. Attended it part of the time. Was there two days. The first day I was there three or four hours, the next day about one hour. Went there for the purpose of buying anything that went cheap. There were quite a number of buyers there, principally from Galveston, a good many from Houston and there were strangers there. I do not know where they were from. Some there I recognized as Houston people. There was competition in the bidding on those goods, pretty active. I was familiar with most everything there. I thought they brought pretty fair prices. I went there thinking if I found them going very cheap I would buy anything I found going very cheap. I made a few purchases, very few things I considered cheap. I could not say the goods brought their full value. They brought on an average fair prices. The value of goods in the wholesale trade is not the same as in the retail trade. Retail prices are higher. Retailers pay a profit to the jobbers. These were jobbing goods, that is Freiberg, Klein & Co. were a wholesaling and jobbing house. The wholesale value of
299 the goods, in the sense of the trade, is represented by the cost and transportation of the goods, the cost of putting them in the house.

Cross-examined witness testified:

I would have bought anything that went at a bargain. I would not have bought anything that I did not need in the business

There were some things there not handled by us at all. Went there to buy bargains, and expected to buy bargains there, such as would occur at an auction sale. By fair prices I mean those prices were very near the cost prices of the goods at the time, the value of the goods at the time. There were some things that were sold higher than I could have bought at the regular prices for such a lot. I did not figure up on them. I cannot say whether they brought their full prices or not, but I think they brought very fair prices on an average. While I was there jobbers bought a good many of the goods, and a good many retailers bought too. In one instance I think I paid full price for what I wanted, just what I would have to pay regularly. In reference to others, I might have paid a little under the regular prices. I do not know what per cent. under the prices, probably as much as 10 per cent., I think. One thing we bought there was more than 10 per cent. under the regular price. I bought very little goods. There were very little, I considered, went at a bargain at all. Other jobbers bought.

Re-examined, witness testified:

I recollect purchasing cigars there. Moore bought the cigars, I did not buy them in person. We bought those cigars, and that was the item I had reference to. There was another item, if you want me to designate it, a package of apple brandy we wanted. I paid full price for it. I will say going to a sale of that sort that if it was necessary we would like to buy cheaper, but I needed these and I would have been willing to pay anything. I would have paid regular price for anything I absolutely needed. I arrive at my estimate of the value of such a stock of goods as that by taking the actual cost of the goods and adding the cost of the transportation; that is the actual value.

300 Cross-examined, witness testified:

I do not mean that that is the selling value.

CHARLES GRUMBACH, witness for defendants, testified:

I am in the cigar business in Houston, have been in it off and on about seven years, in the past few years regularly. Am familiar with the prices to the trade, and everywhere of cigars sold on the Texas market. I attended the sale of the Freiberg, Klein & Co. stock, bought for other parties, not for myself. I bought them for Theodore Keller, of Houston. He is a large dealer in cigars. I was buying them with an interest in the profit at the time. The cigars brought pretty fair values. That is, having reference to the actual cost and carriage of the goods. Some of them brought their cost and carriage, some of them did not. None exceeded it that I know of. If I recollect right, I bought from $10,000 to $12,000 worth, perhaps more than that of cigars alone. I bought some other goods, some whiskey for Mr. Sterne, one lot of 12 barrels. I am familiar with the value of the whiskey. Don't pretend to be an expert, but know the market value of same. I think the 12 barrels I bought for Mr. Sterne I bought about $10 a barrel below

the market value. That was the commission I was allowed on them, the margin between the price I paid and the full value. The cigars we bought at a little less than value. Whiskies are sold according to understanding between the purchaser and seller, sometimes for cash, sometimes on credit. I bought for cash and paid within $10 a barrel of the value. The majority of jobbers sell whiskey at 60 to 90 days or four months, or so much off for cash, but the majority of the distillers sell on the basis of so much off for cash. That rule does not altogether obtain with the jobbers, a good deal is bought strictly for cash; if a man wants to take advantage of the discount he has to pay strict cash for it.

Cross-examined, witness testified:

Sterne and Keller were jobbers of good standing, able to take advantage of discounts. I came down especially to attend the sale to see if I could buy any bargains. I was interested in half
301 the profit with Mr. Keller, and also interested in the purchases I made for Frank Sterne. I contemplated moving the goods I bought to Houston. I did not come down to buy any regular goods at all except 12 barrels of whiskey for Mr. Sterne. He was in need of them at the time, otherwise I would not buy anything unless at a bargain, would not come to an auction sale unless I got a bargain or unless we needed the goods. Bought the whiskey 2 or 2½c. per gallon less than the regular prices. I would figure what it would cost laid down in Houston taking advantage of the cash discount. The cigars I bought at something under the regular price. Some of them 5 and some of them 10 per cent. One lot less, and one small lot I remember particularly I bought, I do not know whether the jobbers have to pay it, they are supposed to buy cheaper than a man who buys in a small quantity. Some of the goods I bought would be 20 per cent. less than the regular price, but in small lots. The large lots brought very nearly the market prices, according to my knowledge. By the market price I mean the market price from the manufacturers less the discount.

W. B. KING, witness for defendants, testified: I live in Houston, am in the wholesale liquor and cigar business, and have been for twelve years, in Galveston and in Houston. I attended the marshal's sale of the Freiberg, Klein & Co. stock of goods. I attended for the purpose of buying. I am familiar with that class of goods, have been buying them for the past twelve years. I came prepared to make purchases. Had made arrangements to borrow a good deal of money. I was prepared to invest $20,000 or $30,000 if there was anything going cheap. I invested $3,000 or $4,000, not more, because they brought too much money, I thought the goods sold there brought their value. I think all the houses in Houston were represented there and other points, saw one or two parties from Palestine and other points. Competition in buying was vigorous.

Cross-examined witness testified:

I do not remember the date of the sale, think I bought about

$3,000 or $4,000 worth of goods, about three car-loads odds
302 and ends, did not get them cheap, after I got home and compared prices with discounts etc., I found I paid pretty good prices for them. For instance, wines we bought on four months' time. I remember buying a lot of 15 or 20 barrels of sweet Catawba. We bought these goods at certain price on four months' time, with 4 or 5 per cent. discount for cash. These goods were bought for spot cash, and when I got home and looked over my old invoices and after I had taken off 4 or 5 per cent. discount I found I had paid as much for these goods as if I had bought them at headquarters. I don't believe there was any difference on the sweet Catawba. I think we paid full value for that. That amounted to $400 or $500 that lot. I think the balance of my purchases compared about equally with this lot. I do not think they were exceeding 5 per cent. less than the regular price. I did not save transportation and 5 per cent. The Catawba wine that I have been speaking of we had been buying delivered. I did not figure very closely on all of it, but I do not think we saved much more than freight on the goods. I am a wholesale dealer, buy at first hands, do not always take advantage of cash discount, buy on time and sometimes for cash. This was for cash and should be figured with the discount off. When I got home and compared with some of my old invoices, goods that I had been buying on four months' time, after I took the discount off I found I paid full price for them. I came down to buy goods cheap. All came down for the purpose of buying goods if anything went cheap. I think everybody who attended the sale bought something, some, however, bought very little. I think all the goods were sold, but I think Lovejoy and Teuscher bought a good many of them; they were not all sold to the parties that came down from Houston to attend the sale. I could not tell what proportion Lovejoy and Teuscher bought, but a considerable quantity, I think, they held the prices up pretty well. If anybody got anything they had to pay good prices. They kept everything from going cheap. Mr Lovejoy is a lawyer, not engaged in the mercantile business. No one told me whom he represented at the sale but Teuscher was with him all the time and I suppose
he was buying the goods for Teuscher & Co. I believe the
303 goods were knocked down as they were bought to Teuscher & Co. That is my recollection, but I am not positive. I don't think the Moerlein Brewing Company bought much, I remember a lot of registers were knocked down to them. I was not at the sale all the time, but was there most of the time. In speaking of the goods having brought good values I refer by comparison to goods from original dealers, based on the high wine market, what goods were selling for at the distillery.

FRANK STERNE, witness for defendants, testified:

I live in Houston, and am in the wholesale liquor business. I was here at the time of the marshal's sale of the Freiberg, Klein & Co. stock of goods. Came to buy some of the goods. Have had seventeen years' experience with that class of goods. Was in

attendance on the sale two days, that is a day and a fraction of another day. A number of bidders were here, four different parties besides myself in the wholesale liquor line were here from Houston. Some few from elsewhere. People who sell me think I am familiar with the value of such goods. At that sale the goods brought probably within 2½ to 5 per cent. of their market value, freight saved. I came especially to attend the sale. Naturally I would not have come except with the hope of buying some bargains. The sale was some time in January, 1893. As far as liquors were concerned, I attended the sale. I took no interest in the cigars. I do not sell them. A large part of the stock consisted of cigars, to which I paid no attention, and bought none, would not have bought them if they were cheap. Did not handle them at any price. Handle liquors of all kinds. The goods brought as stated within 2½ to 5 per cent. of their market value, freight saved. At that time, from the best of my recollection, the freight would average 48 to 53c. from Louisville and Cincinnati respectively, and I saved that on purchases that I made at that sale. The freight and 2½ to 5 per cent. I guess. What I bought at that sale I could carry to Houston and would thus have saved the freight from the distillery or distributing point on the goods and 2½ to 5 per cent. That is
304 about the idea. I bought some parcels of goods that I have been carrying in stock, one lot I think was 75 barrels alcohol at 2½c. less than from the party that sold to me, 2½c. per gallon. The party was in St. Louis, if my memory serves me right, where it was originally bought. It was shipped from Louisville or some adjacent town. I knew the Louisville price on the cash basis and I saved 2½ per cent. and the freight added, equivalent to 7½c. on the gallon. I am a pirate in any respect where there is money in the whiskey line. It is a staple article. The bulk of the whiskey sold at that sale was staple goods, some cash goods, fancy brands, etc., that may have had an extra reputation on account of the brands, but as a rule they were standard brands of whiskies. Everything sold there was in my immediate line except cigars, which I did not sell and could not tell the value of, and paid no attention to. I would not buy them at any price, because I did not handle them.

Asked: "When you speak of the market price you refer, as I understand you, to the cost from the distillery and cost of transportation?" he answered:

The bottom price based on a cash transaction, from the distillery and the cost of laying it down. I do not mean the wholesale selling price here. There is no market. This is a retail market, there are no jobbers here, no distillers. There are jobbing-houses handling whiskies; that is all right, but that cuts no figure with the value of whiskey, it might with the retailer.

W. F. Beers, witness for plaintiff, testified:

I live and have lived in Galveston 40 years. For fifteen years continuously have been secretary of the Citizens' Loan Company. I remember the failure of Freiberg, Klein & Co. They owed the

Citizens' Loan Company at the time of their failure $10,000. There were two notes of $5,000 each. Each of those notes was endorsed by Fellman & Grumbach. Freiberg, Klein & Co. got the money on them. The last date I saw with reference to those notes on my ledger was November 23rd, 1892. The payment appears to have been made in February, 1892. The notes were paid by Fellman & Grumbach, to whom I surrendered them. These notes
305 were renewals of previous obligations that had been running for a year or so. In addition to my being secretary of the Citizens' Loan Company, I am an insurance agent. The Citizens' Loan Company always had two-name paper and it was passed on by the finance committee. They required both names on paper that they got to be first-class both of them. I heard of the failure of Freiberg, Klein & Co., the day after the failure. I was surprised at hearing it because I had no reason to suspect it. I had heard no rumors concerning their affairs or of their insolvency. Had there been any such rumors about Freiberg, Klein & Co. on the streets in Galveston for two or three months before the failure, I think I was in a position to have heard them, as secretary of the Citizens' Loan Company I was in touch with all the banks and met people in my office engaged in financial matters in Galveston. Had there been any such rumors I would have heard them. The habit and custom of the Citizens' Loan Company in respect of paper upon which one or the other of the names were insolvent or reputed to be so was to call for a fresh name. They did not call for any new name in November, 1892, when they renewed the paper of Freiberg, Klein & Co. with Fellman & Grumbach's endorsement. I knew E. H. Gorse. I cannot recall that he at any time in 1892 called on me for information regarding Freiberg, Klein & Co. I was well known then and now as the secretary of the Citizens' Loan Company. The date of the last renewal note of Freiberg, Klein & Co. to the Citizens' Loan Company was November 23, 1892. This was the third or fourth extension of the same indebtedness. Extensions were ordinarily 90 days, sometimes four months. There were five or six entries of extensions in my books. I did not make any investigation of the assets and liabilities of Freiberg, Klein & Co. when the trust deed was made. Mr. Lasker was vice-president at the time, and he said the endorsement of Fellman & Grumbach made it perfectly safe without the assignment. I did not know of the steps taken by Mr. Lasker with reference to the deed of trust. The debt of Freiberg, Klein & Co. to the Citizens' Loan Company was paid at maturity February, 1893, ninety days after date of the note.

306 W. N. STOWE, witness for plaintiff, testified:

I live in Galveston; have lived there about fifty years; I am cashier of the First National bank; was cashier of it in 1892; remember the failure of Freiberg, Klein & Co. The First National bank was their creditor to the amount of about $25,000, for which we held notes endorsed Fellman & Grumbach. The claim was paid. The trustee, J. Sonnentheil, paid me $12,500, and the balance was paid by Fellman & Grumbach. After the payment by Fellman &

Grumbach, I retained the notes in the bank for collection from the trustee for account of Fellman & Grumbach. I have one of them still, on which $2,500 has been paid. I heard of the failure of Freiberg, Klein & Co. on the day of the next day after it occurred. Did not know it was impending before it occurred. I have been in the banking business about sixteen years. They have been doing business with us ever since I have been there. At one time they kept an active account with us, and I think in about 1890 they withdrew their active account and did a discount business with us. Ever since I have been cashier of the bank I have been in daily contact with people engaged in financial matters in Galveston. Had there been rumors affecting the solvency or standing of a large firm in Galveston, I would have heard of it. I heard no rumors during the fall of 1892 concerning Freiberg, Klein & Co., or at any time prior thereto. During the summer or fall of 1892, I think I was in a position to hear such rumors had they been current. I am cashier of the bank there, and it is natural that I should. I would have heard it from my own officers if from no one else. I know E. H. Gorse, who represented R. G. Dun & Co. here. He was in the bank several times to see me, as all those men do whenever they have an inquiry concerning the credit of anybody in the city. I know he came in there once to see me, and asked me about Freiberg, Klein & Co.; said he was getting several inquiries and wanted to know how they stood. I told him I knew nothing about them at all except we could say this for them, we had $25,000 of their paper and we renewed it for them whenever they asked us to do so. I did not tell him whether or not I considered them good. I do not suppose he asked me the question. I did consider them
307 good, however. I would not have taken their paper if I had not. We had endorser on their paper and that made it that much better of course. We had endorsements on paper which makes it so much better to us, and we have lots of paper which has collateral security attached to it and an endorsement also. We get all the security we can. We take paper with one name. We have a right to use our judgment as to one-name paper, if we choose we can require an endorsement and if we know the party we can require collateral, we can take his own note, a personal note without endorsement. If a piece of paper was offered to my bank with one good name and one bad name on it, I would not take it at all, if the maker was a man I know could not pay even if the endorser was a good man.

Cross-examined witness testified:

I was notified to come up and testify in this case through the telephone. I think Mr. Scott summoned me. Mr. Levi told me it was possible he would need me here about 12 o'clock today. Mr. Lasker said some days ago when he was on the stand he thought I might be needed and afterwards told me he did not think they would need me at all. This was mentioned because I was expecting to go away from the city and he wanted me to stay until this case was over. We held the claim against Freiberg, Klein & Co.

I- was a renewal of the former indebtedness. It had been renewed from time to time. I do not know how often, probably six, seven, or eight times. I do not know the date when the last renewal matured.

Asked "When was the balance that Sonnentheil did not pay paid when the paper fell due," he answered:

They owe us some little yet, at least I hold a note of theirs now which runs to maturity. They don't owe the bank anything since the balance was paid by Fellman. Crediting the payments made by Sonnentheil, amounting to about $12,500, the balance was carried on and renewed for Fellman & Grumbach from time to time for thirteen months. They paid me the balance of it, I think in October, 1894. Paper and renewals generally ran 90 days, perhaps four months. We discounted four months' paper in cases. Do
308 not remember whether this was three or four months' paper. Lasker, at the time I am testifying, is in Wichita Falls, left here night before last to be back in three or four days from now.

JACOB SONNENTHEIL, recalled for plaintiff, as a witness for himself, testified:

In Freiberg's deposition it is stated that the entry relating to $5,000 charged against Fellman and secured in that Eckford deed of trust was erased from my trustee's book. I came across my book one day and saw that the entry against Fellman had been erased. I called for Mr. Seinsheimer, and I believe Mr. Freiberg also. I am sure they were both there. I asked them how it was that was erased. They said Fellman did not owe it, and I said "That is not the way to correct an error. If it was an error you should have informed me of it and I would have investigated and if I found it was wrong I would have ordered a cross entry relieving that $5,000." I reprimanded them very severely and made Mr. Seinsheimer restore the entry so the book again showed the $5,000, that is the $5,000 payment shown in these different letters introduced. The erasure was not made and never would have been made with my knowledge or consent.

Cross-examined witness testified:

There is but one Kempner, so far as I know of in this proceeding. He is the brother-in-law of Seinsheimer and the same man who was president of the Island City savings bank. His name is H. Kempner.

LEO N. LEVI, witness for plaintiff, testified:

I am a member of the law firm of Scott, Levi & Smith; knew of this deed of trust of Dec. 16, 1892. Mr. J. Z. H. Scott, of the firm of Scott, Levi & Smith, prepared it. There is a clause erased in it on the third page, as mentioned in the conclusion of the deed, that the erasure was made before signing. It is a fact that the erasure was made before signing. I remember it very distinctly. The erasure was made by Mr. Scott. I know his method of erasure there and anywhere else. The deed is in the hand-

writing of Mr. Scott. In the preparation of the first
309 deed of trust, the one on the 16th, some beer was omitted from the property described as being conveyed to the trustee. My partner, Mr. Smith, interlined the description of the beer in the original deed of trust before it was filed for record, and I was informed it was in the presence of one of the makers of the instrument, the other two were not there at the time the interlineation was made, and I thought it was prudent to get the approval and assent of the other makers of the instrument as to that interlineation in order that there might be no question as to its being authorized at the time it was made, and for that purpose the second instrument was prepared so as to recognize the validity of that interlineation, and while it was being prepared, Mr. Scott and I thought it was wise also to have a power from the different grantors in the second instrument each to the other to make further assurances of title or conveyance or documents that might be necessary for the expeditious conveyance and proper carrying out of the trust. It is customary with us to put that provision in such instruments. It was not in this of Dec. 16th, 1892. It was inadvertently omitted, I presume. At all events, we thought it convenient to have that power because Freiberg and Klein were generally out of the city, and Klein was a non-resident living in Dallas. It was inconvenient and expensive for them to come to Galveston to attend to matters that might arise. There is a further power granted in this second document which was erased from the first, having reference to the management and disposition of notes and accounts. I do not recall and never have been able to recall why that erasure was made in the first instrument. I do recall that it was more desirable to have that power vested in the trustee because our experience in winding up trusts of this sort, that you come to the tail end of it with a lot of insolvent notes and accounts uncollectible, and unless the trustee has power to dispose of them by sale you could practically never wind up a trust. He would have some notes on hand he could not dispose of and he could not wind it up. Therefore, that provision was inserted. The second deed of trust to Sonnentheil is dated December 17th. I was witness to the signature of the parties
310 and proved it up on the 20th before a notary public here. Cannot recall exactly what day it was. Necessarily, before the 20th, or on the 20th, and certainly not earlier than the 17th, but just what date I can't say. I noticed Mr. Freiberg's evidence was that it was on Sunday. I do not think it was. I can't state positively, it was not on Sunday, but if it had been on Sunday I am satisfied that the fact would have impressed itself on my recollection. I very accurately and distinctly recall the fact that Mr. Sonnentheil consulted my firm about his right to sell on a credit, and we had, of course, a great many meetings and consultations with reference to this matter, first and last, both before and after the attachment. I cannot recall definitely everything that transpired at these meetings or who were there. My memory has been somewhat refreshed by the testimony I heard in this case, and I know that the meetings of secured creditors with the trustee and their canvass and

discussion whether the trustee should sell on credit or not was up in our office. It arose from the fact that when Mr. Sonnentheil two or three days after the deed of trust was made was ready to send out one or two men on the road to sell goods he came to the office to know whether the men should be authorized to sell on credit, and asked our advice on that subject. We told him that there was no such power as that contained in the deed of trust and ordinarily a trustee in an instrument of that sort would not have authority to sell on credit. He was directed by the terms of the instrument to realize on the property as speedily as possible, and ordinarily to sell on credit was not working to that end. Thereupon, it was explained to us and to me that the assets consisted very largely of bar-room accounts, people who bought their supplies from Freiberg, Klein & Co., running bar-rooms, and if their supplies were suddenly shut off the accounts that Sonnentheil held against them as trustee would in many instances become worthless. These bar-rooms would have to suspend business and in the interest of collecting these accounts it was necessary to feed them along a little bit with goods in order to collect what they owed. At that time no steps of any kind had been taken to assail Mr. Sonnentheil's title, no attachments had been run or any garnishment, or anything of the sort, and I directed him to consult the
311 parties that were interested and he thereupon convened a meeting of as many of the creditors as he could and discussed that question. Before that the subject of selling on credit was never spoken of as far as I know. This meeting must have been subsequent to the Sunday following the making of the deed of trust on the 16th of December, 1892, because it took two or three days to get things straight. The matter arose from sending out Mr. Huff who had formerly been a drummer of Freiberg, Klein & Co. He was employed by Sonnentheil to go into his territory and sell as many goods as he could and this question arose as to whether he should sell altogether for cash or should take orders on credit. At the time the deed of trust was executed the subject of selling on credit had never been discussed or mentioned by anybody. I do not mean to be understood as intimating that it was contemplated even at the meeting that there should be a general credit business done, but only to extend credit for the purpose of collecting accounts held by the trustee against these bar-rooms. I do not know whether it was Mr. Smith or myself that prepared the Eckford deed of trust. I was certainly in touch with it. If Mr. Smith did it, I assisted in it. I may possibly have written it myself. I am not clear about that. I am familiar with it. Freiberg and Seinsheimer (I do not know that Klein was present at the time) told me they owned the Glen Lee saloon and Randall café in Dallas and that they owed $5,000 to Kempner and asked me to prepare a deed of trust, conveying this saloon and café to Mr. Kempner to secure those notes, two notes of $2,500 each I believe, I don't remember the details, but know that they said they owed $5,000 to Kempner and so I or Smith with me prepared the deed of trust under the information that there was $5,000 due to Mr. Kempner given to me by Freiberg and Sein-

sheimer both. There was no suggestion but that it was a valid indebtedness until Mr. Freiberg testified in the district court. The matter was explained to him afterwards and he saw it in that light. The matter was developed in this correspondence between Fellman and Sonnentheil that they owed Kempner the $5,000. Immediately after the failure of Freiberg, Klein & Co. a telegram
312 from some law firm in Cincinnati came to Scott, Levi & Smith stating in substance that the Moerlein Brewing Company had shipped out beer to Freiberg, Klein & Co. It was either on the track at Galveston or in transit, and that we should take steps to stop it from being delivered to Freiberg, Klein & Co. I informed myself of the facts, found there were two or three cars here and some more in transit. Sonnentheil and the members of the firm of Freiberg, Klein & Co. all agreed that it was beer that should not be and must not be received, that it should be left on the track subject to the order of the Moerlein Brewing Company and I so informed the railroads. I think I was referred to Mr. Walter Lufkin, an official of the railroad, by some official of the Santa Fé office, and I gave him (Mr. Lufkin) directions to simply hold it for the order of the Moerlein Brewing Company, and then a day or so afterwards, some gentleman came over here from New Orleans—I do not remember his name—he was the agent of the Moerlein Brewing Company. He came to me, and I told him the railroad company had it there for their order; that is all I know about it. I do not know how he got it, but he did get the beer.

Cross-examined witness said:

I did not say that Freiberg's deposition in this case is the first intimation I had of his contention that Freiberg, Klein & Co. did not owe Kempner. I say the first intimation to that effect to me was when he testified on the trial in the State court in person, at which time he said he never got that transaction clearly in his head. He then testified about the same facts as he does now, and I cross-examined him on that subject face to face.

(It was admitted that Fellman & Grumbach paid the indebtedness of Freiberg, Klein & Co., to S. A. Walker, to the American National bank, and to the Irving National bank subsequent to the attachment.)

JOHN N. WHALEN, recalled for defendants, testified as follows:

The money I received at the marshal's sale I deposited with the First National bank and Mr. Dickerson, the marshal
313 drew the money out and turned it in to Mr. Dart in the registry of the court. All the money received from those sales we turned into the bank or the clerk here, the clerk of the court. I paid it into the bank. One horse and buggy that was seized under the attachment under suspicion that it belonged to Freiberg, Klein & Co. was subsequently released. It was owned by Mr. Meriwether, an employee of theirs, and the man named Covert had one. I released them both under instructions from Mr. Lovejoy. Everything else was sold. I took everything from Mr. Son-

nentheil, including those buggies, if they were in his charge; I took everything. I did not talk to Mr. Sonnentheil about these buggies belonging to Covert and Meriwether. Mr. Sonnentheil and I had very little conversation. I gave the beer to Mr. Lovejoy—I think it was to Miller and I suppose Mr. Lovejoy came along—I forgot about that. I do not remember making any release of those horses and buggies or that I had them. I released them on the order of Mr. Lovejoy.

Here defendants rested, and plaintiff also rested, and the evidence for all parties was closed.

The above and foregoing from the opening of the evidence by the plaintiff to the closing of the evidence by both parties (as stated above) is all the evidence and proof introduced on the trial of said cause, and such being the case, plaintiff's counsel asked the court to charge the jury as follows—

"The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been at the time of its execution the *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed or had any cause to sus-
314 pect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff who was at the time lawfully in possession of them under said deed and converted them to the use of said brewing company. You are therefore instructed to find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of six per cent. per annum from the date of such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

But the court refused to give said charge to the jury, and to said refusal of the court to give said charge to the jury, the plaintiff then and there excepted before the jury retired from the bar and still excepts. (Exception No. 12.)

And the court having refused to give to the jury the foregoing charge, the plaintiff's counsel asked the court to charge the jury as follows:

"On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent, *I* under the foregoing instructions, the preferred cred-

itors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts as would have caused a reasonably prudent man to have inquired into such intent and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them upon inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent then they would
315 not be chargeable with notice of such intent, unless they had knowledge of it."

But the court refused to give said charge to the jury, and to the said refusal of the court to give said charge to the jury plaintiff then and there excepted before the jury retired from the bar, and still excepts. (Exception No. 13.)

And the court having refused, as aforesaid, to give to the jury the foregoing charges, the plaintiff's counsel asked the court to charge the jury as follows:

"On the question of acceptance I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word 'accept' in accepting the deed of trust. A creditor who communicated to the trustee or to Freiberg, Klein & Co. his willingness to accept the security and benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City savings bank, the Citizens' Loan Company and the First National bank, and he had authority from them either express or implied to do so, the said corporations accepted. In considering his authority you will consider the offices he held, his previous conduct of said offices and the sanction, if any, accorded by the said corporations to his acts of similar nature and to his acceptance, if any, in this matter."

But the court refused to give said charge to the jury, and to the said refusal of the court to give said charge to the jury, plaintiff then and there excepted before the jury retired from the bar, and still excepts. (Exception No. 14.)

And the court having refused as aforesaid to give to the jury the foregoing charges, the plaintiff's counsel asked the court to charge the jury as follows:

"The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the
316 facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument."

But the court refused to give said charge to the jury, and to the said refusal of the court to give said charge to the jury plaintiff then

and there excepted before the jury retired from the bar and still excepts. (Exception No. 15.)

And the court having refused as aforesaid to give to the jury the foregoing charges the plaintiff's counsel asked the court to charge the jury as follows:

"The fact that a debt secured by a deed of trust is also secured by personal indorsements, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as indorser upon his claim, when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman or Fellman & Grumbach may have been guilty of fraud must not affect your verdict, if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's indorsement. The fact that Fellman or Fellman & Grumbach may have, subsequent to the attachment, paid off some of the claims secured by their indorsement must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman or Fellman & Grumbach
317 have been guilty of such fraud as *shown* deny them the right to collect anything on account of the claims they have paid, that is a matter that cannot be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose."

But the court refused to give said charge to the jury, and to the said refusal of the court to give said charge to the jury plaintiff then and there excepted before the jury retired from the bar, and still excepts.

And the court having refused as aforesaid to give to the jury the foregoing charges, the plaintiff's counsel asked the court to charge the jury as follows:

"I have necessarily admitted evidence, which, at the time it was offered I could not foresee the relevancy of. Such, for example, as the testimony relating to Seinsheimer's misconduct towards his partners and the making of false statements to the commercial agency. In respect of this evidence I charge you that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff."

But the court refused to give such charge to the jury, and to such refusal of the court, the plaintiff then and there and before the jury retired from the bar, excepted and still excepts. (Exception No. 16.)

And the court having refused to give to the jury any of the foregoing charges asked as aforesaid by plaintiff, the court then and there charged the jury as follows:

*Charge of the Court to the Jury.*

GENTLEMEN OF THE JURY: On the 16th day of December, 1892, the firm of Freiberg, Klein & Co., executed a deed of trust to Jacob Sonnentheil as trustee, and transferred to him all of their property, practically, I think in whole so far as that is concerned, for the purpose of securing certain creditors named in the deed of trust to be paid in the order therein named. On the 23rd day of De-
318 cember, 1892, the Christian Moerlein Brewing Co. instituted a suit and sued out an attachment, and the attachment was levied upon the property covered by this deed of trust that is not the open account and notes and things of that kind; they were not subject to levy, but upon property that has been stated to you in the presentation of this case, personal property, which the marshal's return will show more definitely. On January 25th, 1893, Jacob Sonnentheil, as such trustee, filed a suit against J. J. Dickerson and the other defendants herein for damages resulting to him, as such trustee, by reason of the levy upon this property and taking it from his possession, and that is the plaintiff's case now before you. He claims that by virtue of the deed of trust that has been offered in evidence, and read in evidence that this property was vested in him, and as such trustee he had the legal right to the possession and control and disposition of that property, to carry out the trust expressed in that deed.

The defendants have answered by a general denial, placing the burden of proof upon the plaintiff to prove the material facts of his case, and they have also specially answered they claiming among other things, that there were certain badges of fraud upon the deed of trust that was made, not claiming these badges rendered void the instrument upon its face but these badges of fraud coupled with other evidence made it fraudulent in fact. They also claim that Mr. L. Fellman, and also the firm of Fellman & Grumbach, were endorsers for the firm of Freiberg, Klein & Co. upon a large amount of paper, amounting to over $100,000, and that in order to secure these endorsers that a conspiracy was formed between Fellman and Freiberg, Klein & Co., by which it was designed that they would swell their credit and procure goods and in that way keep off the crash and they could prefer themselves in order to save Fellman & Grumbach. They further allege this conspiracy was known to the holders of this paper, or if it was not known that the circumstances were such that by the use of reasonable diligence or the diligence that — reasonably prudent person would exercise, they could have known, and therefore, the instrument was fraudulent. They also claim that the parties that were named in this deed of trust, that were preferred, had not accepted the deed of trust prior to
319 the levy of the attachment and, therefore, the trustee did not have the title to the property by which he could maintain the suit. There are not the defenses in full, but they are the substantial defenses, as I understand them, as presented by the defendants.

I have inspected this deed of trust, and my opinion is that upon its face, it is a legal instrument; that upon the execution and delivery of that instrument to Mr. Sonnentheil, that it vested the title in Mr. Sonnentheil—the title therein named—for the purpose therein named. A deed of trust in this State, under the decisions is different from an assignment, an assignment itself presumes that all the creditors named accepted it, in order to make a deed of trust operative it is necessary that the parties for whose benefit it is made, should accept it. It is not necessary that the acceptance should be in writing, nor is there any particular form of acceptance. By the term acceptance it is simply meant that when they understand what has been done that they consent to it, they agree to it, no matter in what form that may be done; anything that shows that after being informed of what has been done, that with a knowledge of these facts, they assent to it, or they agree to it, constitutes and is, in fact, an acceptance.

Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before the attachment is levied, the trustee cannot recover, but if any creditor has accepted the terms of that instrument before the attachment has been levied, the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you, and ably, upon both sides—well presented by the attorneys for the parties on both sides—the contention has been that even if some one creditor did accept, that the trustee could recover only to the extent of the debt thus accepting; the other party has contended that that was not the law, we being in a court of the law, that you could not marshal assets and have an adjustment of the equities, that consequently it was either legal or illegal. I agree with the latter contention. I hold as a matter of law that if you find as a matter of fact that if any creditor accepted the terms of this instrument before the levy of the attachment and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed, the entire property named in this deed passed to the trustee, and for this action he may recover for whatever it may be shown the property was worth at the time and place it was taken.

Upon question of fraud I will read you this from the statutes: "Art. 2465. Every gift, conveyance, assignment or transfer of, or charge upon any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of, or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

Another contention in this case has been that the fraud mentioned by the statute applies only to grantors, that is, Freiberg, Klein & Co. They had contended that if the evidence showed to the satisfac-

tion of the jury that Freiberg, Klein & Co. intended to defraud their creditors that was sufficient to void the instrument. I hold the law to be otherwise. In order to set aside an instrument executed by one party to secure the just debts to another party, in order to avoid that instrument it is necessary that the evidence should show that the party making the instrument was guilty of fraud himself, and the party in whose favor it was made either had actual knowledge of the fraudulent intent of from the circumstances surrounding the transaction, and the evidence taken as a whole would show and indicate that he knew the fraudulent intent, or that he was possessed of information which would put a reasonably prudent person upon inquiry, and if that inquiry had been properly followed it would have led to the knowledge that the instrument was fraudulent. In other words, where a party that is insolvent or in a failing condition, under the laws he has a right to prefer creditors; he
321 has a right to pay one creditor in preference to another if he sees proper to do so, and in doing that, in order to avoid the instrument upon the ground of fraud, the jury must believe from the testimony that the party making the instrument was guilty of fraud himself, and the parties receiving the benefit of it, either was a party to the fraud, or he was possessed of information, (and by information I do not mean direct testimony, I mean circumstances surrounding the transaction) that would indicate to the mind of a reasonably prudent person that there was fraud in the transaction. The natural effect of the instrument given that prefers certain creditors is to hinder and delay other creditors; that is the natural effect of it, but that is not the effect that avoids it; it requires more than that; it requires that the party in making the instrument had an intention not only to prefer this debt in fact, but he intended to acquire some ulterior benefits to himself, he might intend to convey a large amount of property to a trustee with intent of having it sold in bulk for less than its value, and buy it on some other person's name for his benefit. And he might have reason by which he might buy this property in bulk and hold it in the name of some other party, so he could reap an interest or benefit from it, he might have some other fraudulent intention, and some other intention must exist than the mere effect—that it is hindering and delaying other creditors.

Now in this case it is insisted if Mr. Fellman was the endorser upon this paper, they insisted that the conspiracy was entered into between Fellman and the firm of Freiberg, Klein & Co., by which these goods were to be purchased, and with the view and for the purpose of not selling for cash, and the liability of Fellman & Grumbach removed—that a deed of trust would be made by which they would receive the benefits. If you believe that to be true, as a matter of fact, in order that it should affect the right of Sonnentheil in this case; his rights fixed at the date of the deed of trust, which was the 23rd day of December, 1892—the status then was the question of his right then to recover, or his want or right to recover, and the subsequent acts would not affect it in any — what-

ever in my opinion. Consequently in determining that
322 question, if you believe from the evidence, as a matter of fact, that Fellman & Grumbach, or either of them, did enter into conspiracy with Freiberg, Klein & Co., or either of their firm to carry out a scheme of that kind, that would be a fraudulent scheme—one which the law would not tolerate; but you must further believe from the testimony that the party secured in the instrument either knew that such was the intention of these parties and such was their disposition, or you must believe they were in possession of facts and circumstances that would indicate to the mind of a reasonably prudent person if properly followed up would have brought to them the information that such was the conspiracy between the parties. Therefore, you are instructed, that in this case if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment, which bear in mind was the 23rd Dec., 1892—and you further believe from the evidence that any creditor named in that instrument had accepted benefits of this deed of trust prior to the 23rd day of December, or on that date—prior to the levy of the attachment, and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from that testimony that creditor had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff and assess the damages at such sum as the evidence showed the property was worth at the time and place of its seizure, and upon that point I will instruct the market value of the goods was not what they might have been bought for from other places and shipped here, but the market value means the value of the goods where they were, what they consisted of and reasonably could have been sold for at a fair price, not under the hammer, but in a legitimate, proper course of business, without forced sale; that would be the measure of damages at that time with 6 per cent. interest from the time of the levy or the seizure; but I instruct you further if you
323 believe from the evidence in this case that the conspiracy was formed between—I instruct you first, if you don't believe these creditors accepted, or any of them before the attachment was levied you will return a general verdict for the defendant-, but if you find some of the creditors or any of them did, or any of them before the attachment, then you are to inquire into the question whether fraud existed or not. If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you, then you are te extend your investigation and if the fraud (if you find it) was fraudulent, you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent, or whether they had information that would have led to the detection of the fraud that would have put a reasonably prudent person upon inquiry, and

upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of a jury, that is what you are here for; the disputed questions of facts; you are the judges of the weight of the evidence and the credibility of the witnesses and thus being the judges you are to determine who has told the truth and who has not, and in doing that, you have the right to take into consideration the interest of the parties, you have a right to take into consideration the manner of the witnesses on the stand; in fact, you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there, but do what you think is right and just under the law; you must regard the law as your guide, we all bow to it, whatever the law may be, otherwise there would be no law.

I mean, if you believe from the evidence that there is a sin-
324 gle accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now.

On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said accepting creditors knew of said fraud, in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry, in that event you will return a verdict for the defendants.

What I mean is this: If you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment, and that such creditor was not guilty of fraud himself, and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff, but, on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant.

In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston, two living at a distance, and some of them represented here in Galveston, and you have the right to look to the relations of the parties, and all the circumstances surrounding them in order to determine the question

of whether there was fraud or was not fraud, and whether or not the accepting creditors if there were any knew of it, or of facts that would have put a reasonably prudent person on inquiry.

If you find for the plaintiff, the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at
325 — dollars, (stating the amount), with 6 per cent. interest from the 23d day of December, 1892," and date it and sign by your foreman.

If you find for the defendants, the form of your verdict will be: "We, the jury find for the defendants," and date it and sign by your foreman.

Any of you gentlemen can act as foreman.

The instrument that was filed was executed on the 16th day of December, 1892. There was another deed of trust, dated the 17th day of December, 1892, which deed of trust differs in this particular. These words appear in the second instrument with reference to the notes and accounts: "Adjust, compromise or sell at public or private sale."

In the instrument of the 16th there was struck out, and it was inserted in the instrument of the 17th; and the clause I will now read was also added to the instrument of the 17th, which was not in the instrument of the 16th, "and we hereby covenant and agree with the said Jacob Sonnentheil and with the holders of the indebtedness hereby secured that we will make, execute and deliver to the said Jacob Sonnentheil, such other and further transfers, assignments and assurances of title, in particular to any or all of said property and assets, as and when the same may be advised or required under advice of counsel, or as may be reasonably requisite or proper, in order to facilitate and expedite the execution of this trust by the said Jacob Sonnentheil, and we do hereby authorize and empower each and every one of the said partners in the copartnership of Freiberg, Klein & Co., in the name of the said copartnership, and in the name, place and stead of each of said copartners thereto, to make, execute and deliver any and all such further transfers, assignments and assurances of title, in particular, with like effect as though the same were made, executed and delivered by each of us in person. This instrument is made to secure the same indebtedness mentioned in a certain deed of trust in the nature of a chattel mortgage made, executed and delivered by me to the said Jacob Sonnentheil under date of December 16th, 1892, and intended to cover the same assets and property, and is designed to still further assure the speedy and convenient execution and performance of the same general purposes,
326 and not to in anywise impair, but to confirm and increase the security given by the said deed of trust in the nature of a chattel mortgage hereafter executed, as aforesaid."

Gentlemen, my attention has been called to the fact that the second instrument was not recorded, and to the fact of the erasures and additions mentioned. As to the legal effect of these instruments, I think upon their face, they are legal instruments, and that the causes complained of amounting to badges of fraud or signs of

fraud, I think as they apply to this case do not amount to that. The fact that the second instrument was not recorded is immaterial, because the plaintiff, Jacob Sonnentheil, under the undisputed testimony was in the actual possession of the property and therefore it was unnecessary to record it. His possession would be notice to all attaching creditors. The continuing of the employés of Freiberg, Klein & Co. by the plaintiff would be a circumstance tending to show fraud, but it would not be sufficient within itself, but may be considered by you simply as a circumstance in connection with the other testimony in determining the question of intent with which the instrument was made. I*n* instruct you that corporations can only act through their agents, and in order for one of those corporations to have accepted this instrument, it must have been by a party that was expressly authorized by the company or by a party in the management of the business of the company that had ordinarily transacted such business, and that the corporation knew that the party had performed these acts and acquiesced in what he had done in the premises.

D. E. BRYANT, *Judge.*

And to the said charge of the court, as given to the jury, the plaintiff then and there, before the jury retired from the bar excepted, and still excepts, for the following reasons:

First. Because said charge did not contain instructions equivalent to those previously asked by plaintiff, nor to any of them.

Second. Because said charge left the question of the acceptance of the deed of trust by the beneficiaries to the determination
327 of the jury when such acceptance was a question of law which should have been determined by the court; and further, because the entire and uncontradicted proof showed that before the levy of the attachment by the marshal, said deed of trust had been accepted by a portion of the beneficiaries named therein, and also by the trustee, and there was no controverted question of fact in reference to the matter for the jury to determine; and further, because formal and affirmative acceptance by the beneficiaries of the benefits provided for them in said deed of trust was unnecessary as a matter of law to give it effect after acceptance thereof by the trustee, J. Sonnentheil.

Third. Because the said charge left to the determination of the jury the fact whether or not any of the beneficiaries in said deed of trust had knowledge of the fraudulent intent, if any there was, in the making of the same, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust, either had knowledge of any such fraudulent intent, if it existed, or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence, but on the contrary, the uncontradicted evidence was that they had no knowledge of any such fraud, if any there was, or of any fact that would have put them upon inquiry in reference to the same.

The foregoing being as recited, all the evidence given on the trial of said cause and the charge of the court thereupon to the jury, the

jury found the following verdict under the instructions given by the court as aforesaid, to wit:

We, the jury find for the defendants.
Nov. 13, 1895.

I. D. POLK, *Foreman.*

and thereupon the court rendered judgment on said verdict in favor of the defendants, and to the action of the jury in rendering said verdict, as aforesaid, and to the action of the court in rendering said judgment thereupon, the plaintiff then and there excepted because there was no evidence to justify the verdict of the jury and the rendition of said judgment thereupon by the court.

This exception is qualified as follows: At the time the ver-
328 dict was rendered no exception was taken; but a new trial was applied for and my attention was then called to the grounds therein stated, and exception taken to my ruling which I considered as an exception to the verdict, judgment and my action on the motion for new trial. That said verdict and judgment were and each of them was contrary to the evidence and to the law arising thereupon. Exception No. 18.

To commemorate all which, the plaintiff has prepared and tendered to the judge presiding at said trial the foregoing bill of exceptions and each and all of the exceptions therein shown and stated, and prays that the same may be approved and allowed and ordered filed among the papers of said cause in court as a part of the record therein, which said prayer is hereby granted and the said bill of exceptions and each and all of the exceptions therein shown and stated are hereby approved and allowed and ordered to be filed among the papers of said cause as a part of the record therein, and the clerk of the above named court is hereby ordered and directed to file said bill of exceptions as of the last day of the October term of said court, 1895.

Jan'y 9, 1896.

D. E. BRYANT,
*Judge of said Court Presiding on the Trial of the Above Entitled and Numbered Cause.*

Indorsements: "No. 1702. Jacob Sonnentheil *vs.* J. J. Dickerson, *et al.* In the circuit court of the U. S. for the eastern district of Texas. Plaintiff's bills of exceptions. Filed Jan'y 9th, 1896. C. Dart, clerk. Filed Jan'y 9th, 1896, as of Nov'r 14th, 1895, the last day of the October term of court, 1895, by order of the court entered in the cause at said term and by order of the judge granting this bill of exceptions. C. Dart, clerk, by W. L. Hanscom, deputy."

*Application for Writ of Error.*

Filed Jan. 28th, 1896.

United States Circuit Court for Fifth Circuit, Eastern District of Texas, at Galveston.

329 Law Docket.

JACOB SONNENTHEIL, Plaintiff in Error,
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.*, Defendants in Error. } No. 1702.

To the honorable judges of said court:

Jacob Sonnentheil, the above-named plaintiff, respectfully shows to your honors, that on the 13th day of November, 1895, there was rendered in said court, in the above entitled and numbered cause, a judgment in favor of the defendants and against said plaintiff, and that in said judgment and in the proceedings in said cause, there are manifest errors to the great damage of said plaintiff, and that he is desirous of having said judgment reviewed and reversed by the circuit court of appeals of said circuit. He, therefore, prays that a writ of error be granted him to said circuit court, and that a transcript of the record, proceedings and papers upon which said judgment was rendered duly authenticated be sent to the said circuit court of appeals, and that the amount of bond required to suspend the operation of said judgment be fixed.

SCOTT, LEVI & SMITH AND
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Sonnentheil.*

Indorsements: "1702. C. L. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Co., *et al.* Application for writ of error. Filed Jan'y 28th, 1896. C. Dart, clerk."

*Assignment of Errors.*

Filed Jan'y 28th, 1896.

In the United States Circuit Court for the Eastern District of Texas, at Galveston.

JACOB SONNENTHEIL
*vs.*
THE CHRISTIAN MOERLEIN BREWING CO. and J. J. DICKERSON.

330 Jacob Sonnentheil, plaintiff in the above-entitled cause, and applicant for a writ of error therein to the circuit court of the United States for the eastern district of Texas, at Galveston, wherein the said cause was lately determined, comes and says, that

in the record and proceedings in said cause there is manifest error, in this:

First. The court erred in admitting in evidence over the objection of plaintiff's counsel the following document:

(On the letter-head of Freiberg, Klein & Co.)

"JANUARY 16TH, 1893.

"Mr. E. Brown:

"Please accept order of Freiberg, Klein & Co. for $180 on policy, and oblige,

"Respectfully, JAMES E. BURKE."

"Messrs. Freiberg, Klein & Co.

"DEAR SIRS: James E. Burke has assigned an insurance policy to me. As soon as I collect the same, I will hold out for you $180.

"Respectfully, E. BROWN."

(Then follows:)

"Paid the above in full.

FREIBERG, KLEIN & CO.

2, 23, '93."

The pleadings and evidence show that the plaintiff claimed damages for the seizure by Dickerson as United States marshal, of a stock of goods formerly belonging to the firm of Freiberg, Klein & Co., and conveyed by that firm to plaintiff, as trustee, for the benefit of certain preferred creditors, and which had been seized by the marshal under writ of attachment issued at the instance of the defendant The Christian Moerlein Brewing Company, a creditor of Freiberg, Klein & Co., not secured in the deed of trust. The documents were offered in support of the defence that the deed of trust was made with intent to hinder, delay and defraud the unsecured creditors of Freiberg, Klein, & Co., it being claimed by defendants that these documents showed that Freiberg, Klein & Co., were
331 collecting for their benefit some of the assets of the firm. It had been proved that the deed of trust in question was executed, delivered and accepted by the trustee and beneficiaries prior to the levy upon the goods and long prior to the date of either of said documents, and plaintiff's counsel objected to their admission in evidence on the ground that they relate to a transaction subsequent in point of time to the deed of trust and the trustee was not shown to have any knowledge thereof, which facts were established by the evidence. The objection was overruled by the court and the letters read in evidence to the jury.

Second. The court erred in admitting in evidence the following entry in the books of Freiberg, Klein & Co., viz:

"Profit and loss to cover difference in cash occasioned by amount short in various ways during absence, etc., since February, 1891, $2,416.47," which was proved to have been made by Seinsheimer, one of the firm of Freiberg, Klein & Co., on or after December 24th, 1892, and subsequent to the execution, delivery and acceptance of

the *such* deed of trust and its admission in evidence was objected to by plaintiff's counsel for that reason; and further, because the entry related to cash shortage from February, 1891, to date of entry, and the said deed of trust gave the trustee no interest in the cash whatever, and he had no right to claim from Freiberg, Klein & Co., any cash and the entry was the mere admission after the fact by a person who may have been interested in keeping a memorandum of a matter with which the plaintiff had nothing to do. The meaning of the entry was shown to be that this amount of cash was short in the mercantile transactions of Freiberg, Klein & Co., since February, 1891, and it had been charged to profit and loss.

Seinsheimer was acting as book-keeper for plaintiff after he took possession under the deed of trust. During the time he thus acted he also made entries in the books of Freiberg, Klein & Co., which had been turned over by said firm to said trustee. Whilst plaintiff knew that he was making entries in these books, he did not know what such entries were, not having any interest whatever in such entries. He kept a separate set of books in which were entered all the transactions relating to his trust, and looked into the books of Freiberg, Klein & Co., only for the purpose of finding out
332 what belonged to him as trustee, or to get the items of an account when it was to be settled and for no other purposes.

The plaintiff's objections were overruled and the evidence admitted subject to being controlled thereafter by the court. But the court neither by the charge or otherwise excluded or in any manner alluded to the evidence thereafter during the trial.

Third. The court erred in admitting in evidence the following matters:

1. Entries in the books of Freiberg, Klein & Co., showing a charge of $5,000 against L. Fellman, which was one taken from those books and entered in those of the trustee.

2. Correspondence between the trustee and Fellman, which took place in May after the deed of trust was executed, in which the trustee notified Fellman of this charge against him and demanded payment of the amount, and Fellman replied that the $5,000 was used by him to pay off a claim held by H. Kempner against Freiberg, Klein & Co., upon which Fellman was surety and which was secured by collaterals of little value and he did not propose to pay the firm or the trustee anything until all the paper had been satisfied. The trustee was advised by his counsel not to file suit against Fellman, but make him give an account of the securities he held against the claim.

In connection with this entry and correspondence there was read a deed of trust from Freiberg, Klein & Co. to J. J. Eckford, securing Kempner for a debt of $5,000 by lien upon property in Dallas, Texas. Two notes of $2,500 each, signed by Freiberg, Klein & Co., and Fellman & Grumbach, payable to the order of the makers and endorsed by them, and marked on the back: "Paid by L. Fellman. K. Kempner." One of the notes was due Dec. 30, 1892, and the other Dec. 18, 1892, and both were payable to the order of the makers.

Also an abstract of a judgment of G. Edloff *vs.* G.. C. & S. F. R'y Co., and A., T. and S. F. R. R. Co. for $2,462.59, dated April 25, 1893, which judgment was shown to have been one of the collaterals securing the above debt, and to have been transferred by Fellman to the trustee upon the latter paying Fellman the amount
333 advanced by him in the matter of the Eckford collaterals and said judgment being all that was left of the Eckford security after paying expenses. The trustee took this judgment from Fellman and still had it in possession. It was shown that Fellman was security for Freiberg, Klein & Co. on a large amount of their indebtedness, besides the Kempner claim. The trustee never knew anything of the deed of trust and there was no evidence that the accepting creditors had any notice of it.

Plaintiff objected to the introduction of each and every portion of the above evidence, because it was irrelevant and referred to matters occurring after the deed of trust to Sonnentheil had taken effect, and could not affect the validity of the same or the interest of the trustee or the beneficiaries under the deed of trust, which objections were overruled by the court.

Fourth. The court erred in admitting in evidence over the objection of plaintiff for irrelevancy, and being a matter occurring subsequent to acceptance of the deed of trust, the following letter of H. Kempner to J. J. Eckford, in reference to the Eckford deed of trust:

"Mr. J. J. Eckford, Dallas, Texas.

DEAR SIR: In the matter of Messrs. Freiberg, Klein & Co., Mr. Jacob Sonnentheil, of this city, is trustee for all their *assets*, property and assets, and the property assigned for my benefit in Dallas, all proceeds of sale should be accounted for and paid to him. Please deliver or pay to the order of Mr. Jacob Sonnentheil, trustee of Messrs. Freiberg, Klein & Co., all matters, money, etc., in your hands which have been or will now be held for my benefit.

Yours truly, H. KEMPNER."

Fifth. The court erred in admitting evidence to show that a debt to the Citizens' Loan Company secured in the deed of trust to Sonnentheil had been paid since the deed of trust had taken effect over the objection of plaintiff that such evidence was irrelevant and referred to transactions occurring after the deed was accepted.

Sixth. The court erred in allowing the witness Grelling to read to the jury a statement made by him whilst book-keeper of Freiberg, Klein & Co., to Dun's agency of the condition of the firm on Sept. 29, 1892, which statement showed the assets of the firm to
334 be $391,184.74 and their liabilities in notes and accounts $182,561.38; the witness further testifying that this statement was made and handed to him by Seinsheimer, one of the said firm and was taken by the witness to Dun's agency by direction of Seinsheimer, and that the statement was not true as he did not think the firm was solvent at the time; and that the firm went on and bought and sold goods after making this report, buying some

from the said Christian Moerlein Brewing Company and that the firm could not have continued in business if a true report had been made to the agency.

To which evidence plaintiff objected for the reason that neither the plaintiff nor any of the beneficiaries in the deed of trust had been connected with any such representations and said trustee and beneficiaries had no knowledge of the same at or before the time when their rights vested under the deed of trust made to Sonnentheil by Freiberg, Klein & Co., but the court admitted the evidence.

Seventh. The court erred in allowing the witness Grelling to read to the jury a paper which he said he judged was a copy from the record of Dun's agency report made to said Dun's agency on March 14th, 1891, by Freiberg, Klein & Co., showing the assets of the firm to exceed its liabilities, $209,157.09, the witness stating that the report was false and the firm at that time, in his opinion, insolvent.

Plaintiff objected to the reading of this report, for the reason that neither the plaintiff nor any of the beneficiaries under the deed of trust had been connected with any such representations and no one of them had any knowledge or notice of the same when the deed of trust was accepted.

And for the further reason that the paper offered was a mere copy which in the judgment of the witness was taken from the books of Dun's agency and the books were better evidence. But the court overruled the objections and admitted the evidence.

Eighth. The court erred in allowing the witness Grelling — read to the jury a like copy of report made by Freiberg, *to* Klein & Co. to Dun's agency on February 13th, 1892, from which it ap-
335 peared that the assets of said firm exceeded its liabilities $200,987.42, whereas in the opinion of the witness it was insolvent.

Plaintiff's counsel objected to the reading of this report because it was not shown that either the trustee or any of the beneficiaries had any notice of the same when the deed of trust was accepted, and also because the paper purported to be a copy from the books of Dun & Co. which were better evidence. But the court overruled the objection and admitted the statement.

Ninth. The court erred in admitting in evidence the statements of Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deed of trust, in which Freiberg is said to have asked him, Werner, as agent of the Moerlein Brewing Co. to give him, Freiberg, the agency for the sale of beer, and saying that after they got a settlement they would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that they had to fail, which evidence was objected to on the ground that — was hearsay and *res inter alias acta*, it related to facts which occurred after the deed of trust was made; and not shown to have been known or assented to by the trustee or beneficiaries of the deed of trust and was incompetent to affect their interests. But the court overruled the objection and admitted the evidence.

Tenth. The court erred in allowing Moses Freiberg, one of the

firm of Freiberg, Klein & Co., and a witness in behalf of the defendant to testify over the objections of plaintiff, in substance, as follows:

The firm of Freiberg, Klein & Co., were embarrassed in February, 1891, and had to scale a large amount of its indebtedness by paying a portion of the same out of the private means of the partners and obtaining a remission of a portion of the remainder; that this put them ahead financially and enabled them to continue business; that within two months afterwards they were again unable to meet their obligations and held a conference with Fellman & Grumbach, who were their endorsers to the extent of about $135,000.00 and with Harris Kempner, another endorser, at which Fellman stated that he was endorser also on a large amount
336 of other paper, and if the firm failed then, he would break; and it was agreed that it should continue business and try to pull through, but if it failed Fellman should be protected at all hazards by a bill of sale to him of its stock and business whenever the members found that they could no longer meet their obligations. Fellman expected a large amount of the firm's paper to be retired and therefore insisted on its continuing in business. The firm was then solvent but embarrassed. They continued buying and selling as usual and in February, 1892, found their business in bad shape. It was perilous to their creditors to continue business and it would take extraordinary good fortune to pull through. Rumors as to their failing condition impaired their credit in the spring and summer of 1892. They boucht — credit when they could and paid cash when they could not and continued to do thus down to within a few days of their failure.

In December, 1892, when they found they could no longer continue business, they telegraphed to Fellman to come home, their object being to raise money through him to meet their debts or to sell out to him as agreed on.

He came to Galveston, and in a conversation with the witness a few days before the failure, told the latter that after he had bought them out, the witness might run the business in Fellman's name till he could settle with his creditors and Fellman would see that he got money enough for that purpose. The original agreement was to dispose of the stock by bill of sale, but at the last moment it was changed to a deed of trust, which Fellman preferred. Seinsheimer was brother-in-law to Kempner and Grumbach and son-in-law to Fellman.

After the attachments were levied, witness requested Fellman to replevy the stock or buy it out as promised, but he refused, as also to put up $25,000 to enable the firm to settle with their creditors.

Witness also testified that the 2nd deed of trust was made on the Sunday following the execution of the first deed; that previous to making the first deed of trust the firm made a deed of conveyance of real estate direct to Fellman for $10,000 cash, and he considered the property thereby conveyed to be worth twelve or fifteen thousand dollars and the deed was made in anticipation of the
337 bill of sale or deed of trust. He considered the property trans-

ferred to Sonnentheil in the deed of trust worth $225,000.00 or $75,000 more than the debts secured.

That $20,000 of the notes transferred were withheld from the list by Seinsheimer, but upon demand of the trustee were turned over to him.

As to the Eckford deed of trust in favor of Kempner, he stated that he did not know that the firm owed Kempner anything, but supposed the deed was to secure an indebtedness to Fellman.

To the admission of which testimony the plaintiff objected because it was not shown by the evidence that either the beneficiaries in the deed of trust or the trustee Sonnentheil, at or before the execution of said deed and the acquisition of their rights thereunder, had any knowledge, or were chargeable with notice, of the matters testified to by the witness; and as the witness had answered upon cross-examination that neither the trustee nor any of the creditors secured in the deed of trust knew of any of the conversations or transactions he had testified to as occurring prior to or at the time of the making of the deed of trust, between the firm of Freiberg, Klein & Co., or any of its members and Fellman, or Fellman & Grumbach, the testimony so far as such conversations and transactions were concerned was further objected to because of such want of knowledge or notice on the part of said trustee or beneficiaries, but the court overruled both of said objections.

Eleventh. The court erred in allowing the defendants to read as evidence to the jury over the objections of plaintiff's counsel the statements contained in the depositions of E. H. Gorse, a witness for defendants, in answer to direct interrogatories propounded to him by defendants, which evidence was substantially as follows:

That in 1891 and 1892 witness was manager for R. G. Dun & Co.'s commercial agency, and that Greiling, the book-keeper for the firm of Freiberg, Klein & Co. on February 13, 1892, made a statement to said agency showing the assets of the firm to be $407,828.26 and their liabilities $206,840.84, and that they made another statement Sept. 29, 1892, showing their assets to be $391,184.74 and their liabilities $182,561.38. L. A. Grelling made the statements
338 at the instance of Seinsheimer. Large firms made statements once a year, but this additional statement was required of Freiberg, Klein & Co., because it was rumored that they were shaky and their credit suffering. The foregoing statements are copies from the books of Dun's commercial agency in the office of the agency. Their financial condition was inquired about by merchants in the North and East and rumors as to the same were discussed among brokers, bankers and merchants. This made him desire to post himself further as to their foundation and he inquired generally with somewhat unsuccessful results as Grelling and Seinsheimer misrepresented the condition of the firm and bankers were not willing to tell the truth about the firm's affairs as far as related to the banks. These rumors were of sufficient importance to suggest a rigid examination by interested parties.

Witness also attached a statement of the assets and liabilities of Freiberg, Klein & Co., dated March 14, 1891, which he said was a

copy of a statement made by Grelling to the agency at the instance of Seinsheimer on Feb. 1, 1891. Being asked in cross-examination to state through whom he heard the rumors about Freiberg, Klein & Co.'s condition about Sept. 1892, he declined to answer, saying that to do so would be a breach of faith. He also stated that it was his duty to investigate such rumors and to know and note their sources, basis and origin.

The objections to the answers of the witness to direct interrogatories were—

To so much as related to statements made by Freiberg, Klein & Co., to Dun's agency because, first: The matters testified to were not shown to have been known to either Sonnentheil, the trustee or the beneficiaries under the deed of trust of Dec. 16, 1892, at or before the acquisition of the rights of said beneficiaries under said deed. Second, because the testimony related to and embraced copies of original documents not shown to have been lost and not produced or otherwise accounted for, and which were better evidence than the copies.

To so much of said evidence as referred to rumors and the sufficiency of said rumors to induce critical investigation by parties interested, because:

First. The testimony was as to conclusions of witness and
339 not facts upon which the jury could form its conclusions as to the sufficiency of said rumors.

Second. Because the witness on cross-examination refused to give the particulars of such rumors, so as to enable the jury to form their conclusions thereupon.

And as to all said depositions so far as they related to rumors about Freiberg, Klein & Co.'s standing and ability, because the witness when cross-examined, particularly as to said rumors, and his source of information refused to answer in respect thereof, or to give the particular facts. The defendants, in answer to said objections put in evidence, the original report of the said agency of September 29, 1892, which corresponded with the copy, testified to by the witness.

Whereupon, the court overruled plaintiff's objections and allowed said testimony to be read to the jury.

Twelfth. The court erred in refusing to give the following instruction asked by plaintiff's counsel:

"The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, the *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown, that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said

seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed and converted them to the use of said brewing company. You are therefore instructed to find a verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of six per cent. per annum from the date
340 of such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

It having been shown by the uncontradicted evidence that the deed of trust under which the plaintiff claimed title in this case to the goods seized by the defendant, J. J. Dickerson, under an attachment sued out by his codefendant, The Christian Moerlein Brewing Company, and to recover damages for which this suit was brought, was a valid instrument on its face, and so held by the judge before whom the cause was tried; that all the debts secured thereby were the *bona fide* debts of Freiberg, Klein & Co.; that several of the creditors secured by said deed had accepted the same before the levy of the attachment of the Christian Moerlein Brewing Company, among others A. W. Fly, S. A. Walker, Adoue & Lobit, the First National Bank of Galveston, the Island City savings bank and the Citizens' Loan Company; and there was no evidence whatever that either of said parties knew of such intent of Freiberg, Klein & Co., in making said deed, or knew of any fact calculated to put them upon inquiry as to any fraudulent intent in making said deed, but the positive testimony being directly to the contrary, the defendants' witness Freiberg having testified that neither of said beneficiaries knew anything of the circumstances detailed in his testimony which were relied on by defendants to show fraud in the deed, and the utmost extent of the facts brought to their knowledge being rumors that the firm was insolvent, and any inquiries prosecuted by them would have led up to no fact as to the deed of trust other than appeared upon its face and that the makers of it were insolvent when it was executed.

It was also proved that the United States marshal, the defendant Dickerson, under an attachment sued out by The Moerlein Brewing Company his codefendant had by direction of said company seized the goods in question in this case and taken them from
341 plaintiff Sonnentheil, who held them at the time as trustee for the creditors named in said deed, and had converted them to the use of said company.

It had been further shown what the goods thus seized would have been sold for at wholesale at the city of Galveston, the place of seizure, at the time of seizure, and the defendant had introduced evidence for the purpose of showing their cost price in distant markets and the cost of their transportation; as also what they actu-

ally brought when sold at public auction. The whole evidence required a verdict for the plaintiff and the court should have left nothing to the jury except the amount of damages to be recovered.

Thirteenth. After refusing to give the foregoing, the court erred in refusing to give the following special instruction asked by plaintiff's counsel, numbered 5th special instruction:

"On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts, as would have caused a reasonably prudent man to have *ac*quired into such intent and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them upon inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent, then they would not be chargeable with notice of such intent, unless they had knowledge of it."

The evidence having established the acceptance of the deed of trust by several of the preferred creditors prior to the levy of the attachment and evidence having been admitted over the objection of plaintiff's counsel to the effect that there were rumors in Galveston, prior to the failure of Freiberg, Klein & Co. as to the insolvency of said firm, which rumors may have been heard by the said creditors, and the court below having failed to instruct the jury
342 as to the effect of a knowledge on the part of such creditors of the insolvency of said firm, acquired by them before acceptance of the deed of trust, plaintiff's counsel asked the above instruction to the jury, which was refused.

Fourteenth. The court erred in refusing to give the 6th special instruction asked by plaintiff's counsel, which is as follows:

"On the question of acceptance, I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word accept in accepting the deed of trust. A creditor who communicated to the trustee or to Freiberg, Klein & Co., his willingness to accept the security and benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City savings bank, the Citizens' Loan Company and the First National bank, and he had authority from them either express or implied to do so, the said corporations accepted. In considering his authority you will consider the offices he held, his previous conduct of the said offices and the sanction, if any, accorded by the said corporations to his acts of similar nature and to his acceptance, if any, in this matter."

It was proved that M. Lasker accepted the deed of trust claiming to be the agent of the following creditors secured thereby: The First National Bank of Galveston, the Island City savings bank, and the

Citizens' Loan Company. It was proved that at the time he was vice-president and chairman of the committee of finance of the first-named bank and a member of the finance committee of the two other corporations; that he had charge of the financial matters of the bank, especially those pertaining to loans and securities, and that his action in reference to all such matters had never been repudiated by either of the corporations for whom he acted, but always approved, and the charter and by-laws of said corporations showing
that there was no provision in any of them prohibiting them
343 from allowing such agent from accepting a deed of trust for
the bank's benefit or conferring special authority upon any other agent to perform this service.

Fifteenth. The court erred in refusing to give to the jury the following instruction asked by plaintiff's counsel, numbered 6*a*, which is as follows:

"6*a*. The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument."

The defendants having introduced testimony to show, that after the acceptance of the deed by several of the beneficiaries therein, some of the members of the firm of Freiberg, Klein & Co. had attempted to get possession of some of the assets of the firm for their own benefit and had made improper entries on the books of that firm, without the consent of any of such beneficiaries and the court in its general charge had failed to instruct the jury that such conduct, if fraudulent, could not affect the validity of the deed as to such accepting creditors, which evidence the court had admitted over the objection of plaintiff's counsel.

Sixteenth. The court erred in refusing to give to the jury the 7th special instruction asked by plaintiff's counsel, which is as follows:

"7. The fact that a debt secured by a deed of trust is also secured by personal indorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed,
or even by the party whom he holds as an indorser upon his
344 claim when he had no notice of such fraud or reasonable
cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman, *the deed and his acceptance thereof. The fact that Fellman,* or Fellman & Grumbach may have been guilty of fraud must not affect your verdict; if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no

difference that such innocent accepting creditor may have had Fellman & Grumbach's endorsement. The fact that Fellman, or Fellman & Grumbach may have, subsequent to the attachment, paid off some of the claims secured by their endorsement, must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman, or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account of the claims they have paid, that is a matter that cannot be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose."

The defendants had introduced testimony tending to show that Fellman, who was one of the endorsers upon some of the claims secured in the deed of trust, had participated in some of the frauds alleged to have entered into the making of the deed of trust, and that, as to the claims on which he was endorser, the deed was intended to secure him, and the evidence failing to show any knowledge on the part of any of the beneficiaries in the deed, whether those who held claims upon which Fellman was endorser or those upon which there was no endorsement, of any fraud whatever in said deed, or of any facts sufficient to put them upon inquiry as to such frauds or any other, and the court having failed in its main charge to instruct the jury upon the point covered by this instruction.

Seventeenth. The court erred in refusing to give to the jury the 8th special charge asked by plaintiff, which is as follows:

345 "8. I have necessarily admitted evidence, which at the time it was offered I could not foresee the relevancy of. Such for example as the testimony relating to Seinsheimer's misconduct toward his partners, and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff."

The court had admitted over the objections of plaintiff evidence to show that Seinsheimer, one of the firm of Freiberg, Klein & Co., had before the execution of the deed made false representations to a commercial agency, to the effect that Freiberg, Klein & Co. were solvent when in fact it was insolvent, and thus obtained credit for merchandise when it would otherwise have been refused, and the evidence failed to show that either of the beneficiaries named in the deed of trust knew of such false representations, or were put upon inquiry of the same; and it had admitted other evidence tending to show an intermeddling of a member of the firm with its assets of the firm to prevent their coming into the hands of the assignee, without showing any connection of either the assignee or any of the beneficiaries of the deed, or any knowledge or notice on their part of such transactions before the acceptance of the deed of trust.

And the witness Freiberg had also been allowed to testify that

during the active existence of the firm of Freiberg, Klein & Co., Seinsheimer, one of its members, had abstracted and appropriated funds of the firm to his own use and concealed the facts by false entries and figures in the books of the firm.

Eighteenth. The court erred in giving the following clauses of its general charge to the jury:

"* * * you are instructed that in this case, if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment—which bear in mind was the 23rd, Dec. 1892—and you further believe from the evidence that any creditor named in that instrument had accepted benefits of this deed of trust prior to the 23rd day of Dec., or on that date—
346 prior to the levy of the attachment and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from the testimony that creditor had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff * * *"

"* * * if you don't believe these creditors accepted, or any of them before the attachment was levied, you will return a general verdict for the defendant, but if you find some of the creditors or any of them did, or any of them before the attachment, then you are to inquire into the question whether fraud existed or not * * *"

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiff for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now.

In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston; two living at a distance and some of them represented here in Galveston: and you have the right to look to the relations of the parties, and all the circumstances surrounding them in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors if there were any knew of it, or of the facts that would have put a reasonably prudent person on inquiry."

Because in and by means of said clauses the court left the jury to determine whether or not any of the beneficiaries in said deed of trust had accepted the same before the levy of the attachment
347 of the Moerlein Brewing Co., whereas, the question of acceptance *vel non* was a question of law to be determined by the court, but if a question of fact positive and uncontradicted evidence in the cause fully established the acceptance of said deed of trust

prior to the levy of said attachment by the trustee plaintiff in this cause, and thereafter formal and affirmative acceptance thereof by the beneficiaries in said deed of trust was unnecessary to give effect thereto, and moreover said positive and uncontradicted evidence fully established the acceptance of said deed of trust, prior to said levy of said attachment by A. W. Fly, S. A. Walker, Adoue & Lobit, the Citizens' Loan Co., the First National Bank of Galveston, and the Island City savings bank, and by each of them and all of said parties were shown to be the holders at the date of said deed and acceptance of *bona fide* debts against the makers of said deed, which were secured by the same and the plaintiff in the charges set forth in the 12th assignment of error had asked for a charge removing the question of acceptance from the jury, which charge had been refused by the court.

Nineteenth. The court erred in giving the following clause in its general charge to the jury, viz:

"If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you, then you are to extend your investigation and if the fraud (if you find it was fraudulent) you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent, or whether they had information that would have led to the detection of the fraud that would have put a reasonably prudent person upon inquiry, and upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of the jury, that is what you are here for; the disputed questions of fact; you are the judges of the weight
348 of the evidence and the credibility of the witnesses and thus being the judges you are to determine who has told the truth and who has not; and in doing that, you have the right to take into consideration the interest of the parties, you have the right to take into consideration the manner of the witnesses on the stand; in fact, you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there, but do what you think is right and just under the law; you must regard the law as your guide, we all bow to it, whatever the law may be, otherwise there would be no law."

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23rd day of December, 1892, in Galveston,

Texas, with interest at the rate of 6 per cent. per annum from that date until now."

"On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said accepting creditors knew of said fraud, in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry, in that event you will return a verdict for the defendants."

"What I mean is this: If you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment and that such creditor was not guilty of fraud himself, and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff, but, on the other hand, if you find that the creditor, or creditors had accepted said deed of trust before the levy of said attachment and were either guilty of fraud themselves or were possessed
349 of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant-."

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston—two living at a distance and some of them represented here in Galveston; and you have the right to look to the relations of the parties, and all the circumstances surrounding them in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors if there were any knew of it, or of facts that would have put a reasonably prudent person on inquiry."

Because the said clauses of the charge left to the determination of the jury the fact as to whether or not any of the beneficiaries in said deed of trust had knowledge of the fraudulent intent, if any there was, in the making of the same, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of such fraudulent intent, if it existed, or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence, but on the contrary, the uncontradicted evidence was that they had no knowledge when they accepted such deed of such fraud, if any there was, or of any fact that would have put them upon inquiry in reference to the same, and the plaintiff had asked of the court, as shown in the 12th assignment of error, a charge to the effect that there was no such evidence in the case.

Twentieth. The verdict of the jury and the judgment rendered in the cause were unsupported by the evidence produced at the trial, and said verdict and judgment should have been in favor of the plaintiff instead of the defendants. The following facts, as appears by the bills of exceptions approved by the trial judge, were established in evidence:

1. That the plaintiff, Sonnentheil, was, on the 23rd of December, 1892, in possession of the property to recover the value of which

this suit was brought, holding it under a valid deed of *deed of* trust executed to him as trustee by the firm of Freiberg, Klein &
350 Co. to secure the payment of certain *bona fide* debts due to creditors named in said deed.

2. That several of said secured creditors had duly accepted said deed of trust before that date.

3. That after such acceptance and whilst plaintiff was in possession of said property under the deed, it was seized and taken out of his possession by the defendant J. J. Dickerson, as United States marshal, and under and by virtue of a writ of attachment sued out in the circuit court of the United States for the eastern district by the defendant, The Christian Moerlein Brewing Company, said seizure and dispossession being directed by said company, the plaintiff in attachment claiming that said property belonged to said Freiberg, Klein & Co.

4. That Fellman and Grumbach were endorsers upon some of the debts secured in the deed of trust, but some of said debts were not endorsed by them, or any one else, or secured in any way except by said deed of trust.

5. Even conceding that there was proof tending to show that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay, or defraud the creditors not secured in the deed, and that Fellman participated therein, it was proven positively that none of the beneficiaries in said deed before acceptance of the same knew of any such fraud and there was no evidence whatever tending to show that before accepting said deed of trust, either those who held Fellman & Grumbach's endorsement on their paper, or those who did not, knew of any fraud in the making of said deed, or of any facts which would put them upon inquiry as to fraud in the same, or that any inquiries they could have made would have led up to a knowledge of any fraudulent intent with which said deed was executed.

6. The value of the goods at the time and place of their seizure by the marshal was proven.

With these facts proven the jury could not, under the charge of the court as given, and which was not excepted to by defendants, find any verdict other than for the plaintiffs below, and its verdict for the defendants was such error as demands a reversal of the judgment below.

For the several errors set forth in the foregoing assign-
351 ments and for each of them plaintiff respectfully asks that the judgment be reversed and the cause remanded.

SCOTT, LEVI & SMITH AND
WILLIE, CAMPBELL & BALLINGER,
*Att'ys for Jacob Sonnentheil, Plaintiff.*

Indorsements: " No. 1702, C. L. Jacob Sonnentheil, plaintiff, *vs.* The Christian Moerlein Brewing Co. *et al.*, defendants. Plaintiff's assignment of errors. Filed Jan'y 28, 1896. C. Dart, clerk.

*Original Writ of Error.*

Filed Jan. 30, 1896.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Jacob Sonnentheil, plaintiff, and The Christian Moerlein Brewing Company and J. J. Dickerson, defendants, numbered 1702 upon the law docket of said court holding sessions at Galveston, in which said suit a final judgment was rendered in said court on the 13th day of November, 1895, in favor of said defendants and against said plaintiff a manifest error hath happened, to the great damage of the said Jacob Sonnentheil, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid
352 being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] C. DART,
*Clerk of the Circuit Court of the United States for the Eastern District of Texas.*

Approved, January 29, 1896, by—
D. E. BRYANT, *Judge.*

I certify that the plaintiff's assignment of errors and application for writ of error has been filed.

January 28, 1896.

Attest: C. DART, *Clerk.*

IN CHAMBERS, *January* 29, 1896.

Bond in the within cause is fixed at $2,500 to be approved by the circuit clerk of this court at Galveston, Texas.

D. E. BRYANT, *Judge.*

Indorsements: "No. 1702, law docket. United States circuit court, eastern district of Texas, at Galveston. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Co. *et al.* Original writ of error. Filed January 30, 1896. C. Dart, clerk."

*Citation on Writ of Error.*

Filed Feb'y 1, 1896.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Christian Moerlein Brewing Company and J. J. Dickerson, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth
353 circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, wherein Jacob Sonnentheil, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] D. E. BRYANT, *Judge.*

*Marshal's Return.*

On this 14th day of February, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Wm. P. Owens, deputy U. S. M., before me, the subscriber, C. Dart, clerk U. S. circuit court E. D. T., and makes oath that he delivered a true copy of the within citation to Alex. Sampson, of the firm of Lovejoy & Sampson, and M. E. Kleberg, of the firm of Hume & Kleberg, attorneys for the defendants, The Christian Moerlein Brewing Co., and J. J. Dickerson.

WM. P. OWENS,
*Deputy U. S. Marshal, Eastern District Texas.*

Sworn to and subscribed the 4th February, A. D. 1896.

[SEAL.] C. DART,
*Clerk U. S. Circuit Court, E. D. T.,*
By W. L. HANSCOM, *Deputy.*

Indorsements: "No. 1702. Law docket. United States circuit court, eastern district of Texas, at Galveston. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Company *et al.* Citation on writ of error. Issued February 1st, 1896. Returned and filed 4th day of February, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy."

354 *Bond on Writ of Error.*

Filed February 3rd, 1896.

Know all men by these presents that we, Jacob Sonnentheil, as principal, and L. Fellman and S. Blum, as sureties, are held and firmly bound unto The Christian Moerlein Brewing Company and J. J. Dickerson in the full and just sum of twenty-five hundred dollars to be paid to the said The Christian Moerlein Brewing Company and J. J. Dickerson, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a regular term of the circuit court of the United States for the eastern district of Texas, at Galveston, in a suit depending in said court between Jacob Sonnentheil, plaintiff, and The Christian Moerlein Brewing Company and J. J. Dickerson, defendants, numbered 1702 upon the law docket of said court, a judgment was rendered against the said Jacob Sonnentheil, plaintiff, on the 13th day of November, 1895, and the said Jacob Sonnentheil having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said The Christian Moerlein Brewing Company and J. J. Dickerson citing and admonishing them to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Jacob Sonnentheil shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] JACOB SONNENTHEIL.
[SEAL.] L. FELLMAN.
[SEAL.] S. BLUM.

355 Sealed and delivered in presence of—

W. L. HANSCOM,
*Com'r U. S. C. C., E. D. T.,*
As to L. Fellman and S. Blum.

Approved Feb'ry 1, 1896, by—

D. E. BRYANT, *Judge.*

I certify to the sufficiency of the sureties on the within bond.
Attest:
[SEAL.] C. DART, *Clerk.*

*Oath to be Taken by Surety.*

I, L. Fellman, do swear that I am worth in my own right, at least the sum of twenty-five hundred dollars, after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth twenty-five hundred dollars or more.

L. FELLMAN, *Surety.*

Sworn to and subscribed before me, this the 31st day of Jan'y, A. D. 1896, as witness my hand and official seal.

[SEAL.] W. L. HANSCOM,
*Commissioner U. S. Circuit Court, Eastern District of Texas.*

*Oath to be Taken by Surety.*

I, S. Blum, do swear that I am worth, in my own right, at least the sum of twenty-five hundred dollars, after deducting from my property, all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth twenty-five hundred dollars or more.

SYLVAIN BLUM, *Surety.*

356 Sworn to and subscribed before me, this the 31st day of Jan'y, A. D. 1896, as witness my hand and official seal.

[SEAL.] W. L. HANSCOM,
*Commissioner U. S. Circuit Court, Eastern District of Texas.*

Indorsements: "No. 1702. Law docket. United States circuit court, eastern district of Texas, at Galveston. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Co. *et al.* Bond on writ of error. Filed this the 3d day of February, A. D. 1896. C. Dart, clerk."

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in cause No. 1702 on the law docket of said court, entitled Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Company and J. J.

Dickerson, as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this, the 7th day of February, A. D. 1896.

[SEAL.] C. DART,
*Clerk U. S. Circuit Court, Eastern District of Texas,*
By W. L. HANSCOM, *Deputy.*

Indorsed: No. 1702. United States circuit court, eastern district of Texas. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Company *et al.* Copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

357 Because in the record and proceedings, as also in the rendition of the judgment of a plea *of* which is in the said circuit court, before you, or some of you, between Jacob Sonnentheil, plaintiff, and The Christian Moerlein Brewing Company and J. J. Dickerson, defendants, numbered 1702 upon the law docket of said court holding sessions at Galveston, in which said suit a final judgment was rendered in said court on the 13th day of November, 1895, in favor of said defendants and against said plaintiff a manifest error hath happened, to the great damage of the said Jacob Sonnentheil, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, *and* the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] C. DART,
*Clerk of the Circuit Court of the United States for the Eastern District of Texas.*

Allowed January 29th, 1896, by—

D. E. BRYANT, *Judge.*

IN CHAMBERS, *January 29th*, 1896.

Bond in the within cause is fixed at $2,500.00, to be approved by the circuit clerk of this court at Galveston, Texas.

D. E. BRYANT, *Judge.*

358 I certify that the plaintiff's assignment of error, and application for writ of error has been filed.

Attest: C. DART, *Clerk.*

Jan'y 28, '96.

Endorsed: No. 1702. Law docket, United States circuit —, eastern district of Texas, at Galveston. Jacob Sonnenth[illegible]. The Christian Moerlein Brewing Co. *et al.* Original w[illegible] of error. Filed January 30th, 1896. C. Dart, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Christian Moerlein Brewing Company and J. J. Dickerson, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, La., within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, wherein Jacob Sonnentheil is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of February, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] D. E. BRYANT, *Judge.*

On this 4th day of February, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Wm. P. Owens, deputy U. S. M., before me, the subscriber, C. Dart, clerk U. S. circuit court, E. D. T., and makes oath that he delivered a true copy of the within citation to Alex. Sampson, of the firm of Lovejoy & Sampson, and M. E. Kleberg, of the firm of Hume & Kleberg, attorneys for the defendants, The Christian Moerlein Brewing Company, and J. J. Dickerson.

359 WM. P. OWENS,
*Deputy U. S. Marshal, Eastern District Texas.*

Sworn to and subscribed the 4th February, A. D. 1896.

C. DART,
*Clerk U. S. Circuit Court, E. D. T.,*
[SEAL.] By W. L. HANSCOM, *Deputy.*

Endorsed: No. 1702. Law docket United States circuit court, eastern district of Texas, at Galveston. Jacob Sonnentheil *vs.* The Christian Moerlein Brewing Company *et al.* Citation on writ of error. Issued February 1, 1896. Returned and filed 4th day of February, 1896. C. Dart, clerk, by Geo. H. Burnett, deputy.
(Endorsed:) Filed Feb'y 26, 1896. J. M. McKee, clerk.

360 *Proceedings in United States Circuit Court of Appeals, Fifth Circuit.*

November Term, 1895.

MONDAY, *May 25th*, 1896.

(Extract from Minutes.)

JACOB SONNENTHEIL
*v.*
CHRISTIAN MOERLEIN BREWING COMPANY *et al.*

This cause came on to be heard this day and was submitted to the court after argument by Mr. A. H. Willie and Mr. Leo Levi for plaintiff in error and by Mr. F. Charles Hume for defendant in error.

November Term, 1895.

TUESDAY, *June* 9, 1896.

(Extract from Minutes.)

JACOB SONNENTHEIL
*v.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et als.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further adjudged by this court that the plaintiff in error, Jacob Sonnentheil, and the sureties on the writ of error bond herein, L. Fellman and S. Blum, be condemned *in solido* to pay the
360½ costs of this cause in this court, for which execution may be issued out of said circuit court.

November Term, 1895.

MONDAY, *June* 15, 1896.

(Extract from Minutes.)

JACOB SONNENTHEIL
*v.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.*

On motion of plaintiff in error it is ordered that he have leave to file a petition for rehearing herein by the 22nd day of this month.

And afterwards, to wit, on the 19th day of June, 1896, a petition for rehearing was filed in said cause in the words and figures following, to wit:

361 JACOB SONNENTHEIL
*vs.*
CHRISTIAN MOERLEIN BREWING CO. *et al.*

To the hon. judges of the United States circuit court of appeals for the fifth district:

Jacob Sonnentheil, plaintiff in error in the above-entitled cause makes this his application for a rehearing therein, and with due respect asks the court that the same be filed and granted.

Applicant respectfully represents, that in affirming the judgment rendered by the circuit court of the United States for the eastern district of Texas in said cause, this court has failed to consider and pass upon many of the errors assigned by the plaintiff in error as having occurred in the proceedings and judgment of the court below. It has treated the case as if the only error assigned and urged in this court, was the failure of the judge below to give
362 the peremptory charge set forth and commented upon in the court's opinion affirming said judgment, whereas there were numerous other errors assigned and insisted on as cause for reversal in this court in plaintiff's brief and argument as will more fully appear from the following statement.

1. The thirteenth assignment of error complains of the refusal of the judge below to give the following as law to the jury: "Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them" (the preferred creditors) "upon inquiry as to the alleged fraudulent intent." The rest of said charge being undisputed law and given in effect to the jury in the general charge of the court and the clause quoted being well-settled law, and pertinent to one of the vital issues in the case, the court should have so instructed the jury, and the failure to do so left the jury without any charge upon the question, and was error for which the judgment should have been reversed.

That this error was assigned and exception to the court's action duly reserved, see Transcript p. 314, 341, and that it was urged in this court see Brief of Plaintiff in Error pp. 18, 47, 48.

2. The eleventh assignment of error points out a ruling of the court below that allowed illegal evidence to be introduced as to the insolvency of the firm of Freiberg, Klein & Co. The witness Gorse testified as to rumors prevalent in Galveston about the threatened insolvency of Freiberg, Klein & Co. Upon cross-examination he refused to give the source or particulars of these rumors, and for this, among other reasons, plaintiff objected to his testimony in this respect, and the court below overruled the objection and ad-
363 mitted his depositions in evidence. This evidence was upon a matter of great importance to the case as it tended to affect the finding of the jury upon the question as to whether the bene-

ficiaries in the deed of trust had knowledge of any fraudulent intent in the making of the deed of trust.

The point as to the admissibility of the evidence was duly reserved by bill of exceptions. Rec. p. 289. It was made the subject of an assignment of error, *ib.* 337; and was insisted on in this court in appellant's brief and argument. Brief pp. 31, 50. The admission of the evidence tended to prejudice plaintiff's case before the jury. This court has, however, declined to determine as to the legality of the court's action upon the question.

3. The fourteenth assignment of error which brings up the question as to the acceptance of the deed of trust by the preferred corporations through Lasker has also been passed without consideration in the opinion of the court. The judge below charged that in order to constitute an acceptance by one of these corporations it must have been by a party that was expressly authorized by the company or by a party in the management of the business of the company that had ordinarily transacted such business and that the corporation knew that the party had performed these acts and acquiesced in what he had done in the premises; thus leading the jury to believe that the corporation must have sanctioned the very acts of acceptance in question in order to make it binding upon it. Our sixth special instruction was intended to prevent any misapprehension in this respect, and to charge that the acceptance was good if previous acts of a similar nature performed by the agent had been sanctioned by the corporation. But the court refused our charge, thus leading the jury to believe that Lasker's acts in accepting this particular deed of trust must have been ap-
364 proved by the corporation for which he was acting in order to render his acceptance of any avail.

This question was saved by bill of exceptions, duly taken, *ib.* p. 315; is made the subject of the fourteenth assignment of error, *ib.* 342; and was urged in this court in the brief and argument of counsel for plaintiff in error. (Brief pp. 36, 37, 38, 39.)

4. By the first, second, third and fourth assignments of error, the attention of this court was called to the improper admission of evidence as to misconduct of the grantors of the deed of trust occurring after it had been accepted and the trustee was in possession under it, which assignments have not been passed upon by the court though urged in the brief of counsel, and exceptions were duly taken to the action of the court when the evidence was admitted. See Rec. pp. 178 to 186 inclusive.

The ground of objection to this evidence was that the facts proven by it could not possibly affect the rights of the preferred creditors, as they could not have known at the time of their acceptance of facts transpiring long afterwards. Brief pp. 30 and 49.

5. We respectfully claim further, that the court has erred in holding that the court below rightfully refused to give the general charge requested by plaintiffs in error, taking from the jury the right to pass upon the fact as to whether there had been an acceptance of the deed of trust by any of the preferred creditors before the

levy of the attachment, and as to whether such acceptance was given without notice of the fraud in the deed of trust; there being no conflict of evidence on these questions, but the undisputed testimony, showing such acceptance and want of any such notice.

365 6. The court too has failed to pass upon the correctness of the general charge given in the court below, in so far as it was excepted to by plaintiff in error.

Error was assigned as to that portion of the charge which left to the jury the right to determine whether or not any creditor had accepted the deed of trust before levy of the attachment, when the proof was positive and uncontradicted that such acceptance had taken place before such levy.

It was also assigned as to that portion of the charge which left to the jury to determine whether the accepting creditors had notice of the fraud, when there was no evidence showing such notice, and nothing for the jury to pass upon either as to such notice or such acceptance.

See eighteenth assignment of error, pp. 345, 346.

This point was made and insisted on in our brief and argument in this court.

See point 12, brief p. 31 and argument under point 4, pp. 39, 48.

7. What we have said as to the eighteenth assignment of error applies also to the nineteenth. In this the court repeated its charge leaving to the jury the question as to acceptance and knowledge of fraud, or of facts that would put a reasonable man upon inquiry as to fraudulent intent, and as to whether such inquiry if properly pursued in this case, would have led up to a knowledge of fraud in the making of the deed of trust. There was no proof to justify such a charge. See Rec. pp. 347, 348, 349.

8. We respectfully claim also that our twentieth assignment of error as to the insufficiency of the evidence to support the

366 verdict has not been considered by this court, though the points embraced in it were urged to the court in our brief and argument. Rec. pp. 349 and 350.

Trusting that by asking a peremptory charge to find for the plaintiffs upon the whole evidence, we have not waived our right to have the district judge's action in admitting illegal evidence, or his refusal to give well-known principles of law in charge to the jury; or his submission of improper issues to them, reviewed, we respectfully pray this honorable court to set aside the judgment of affirmance heretofore rendered in this cause and grant the plaintiff a rehearing of the writ of error and a reversal of the judgment below.

A. H. WILLIE,
A. R. CAMPBELL,
J. Z. H. SCOTT,
LEO. N. LEVI,
*Attorneys for Plaintiff in Error.*

We certify that in our opinion the foregoing application is well

founded in law, and further certify that it is not interposed for delay.

A. H. WILLIE,
A. R. CAMPBELL,
J. Z. H. SCOTT,
LEO. N. LEVI,
*Attorneys for Plaintiff in Error.*

(Endorsed:) Filed June 19, 1896. J. M. McKee, clerk.

367 November Term, 1896.

TUESDAY, *November* 24, 1896.

(Extract from Minutes.)

JACOB SONNENTHEIL
*v.*
CHRISTIAN MOERLEIN BREWING COMPANY *et als.*

This court having now sufficiently considered the petition for rehearing, filed herein by the plaintiff in error, it is ordered that the same be, and is hereby, denied.

368 *Petition for Writ of Error.*

JACOB SONNENTHEIL, Plaintiff in Error,
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON, Defendants in Error.

Cause lately decided in the United States circuit court of appeals, at New Orleans, La.

To the honorable the judges of the Supreme Court of the United States:

Jacob Sonnentheil, plaintiff in error in the above-entitled cause, respectfully shows to your honors that on the 13th day of November, 1895, a judgment was rendered in the circuit court of the United States for the eastern district of Texas in favor of the defendants in said cause and against said plaintiff; that on the 28th day of January, 1896, your petitioner, as said plaintiff, applied for and on the 29th day of said month obtained from the honorable district judge of the United States for said district a writ of error to remove said cause to said court of appeals for the fifth circuit, which was accordingly done; all of which will more fully appear from pages 130, 131, 328, 329, and 351 to 358 of the transcript of the record of said cause in said circuit court of appeals, which accompanies this application.

Petitioner further represents that said cause coming on to be heard upon said writ of error, the judgment rendered therein was on the — day of June, 1896, in all things affirmed by said circuit court

of appeals; that thereupon, to wit, on the — day of June, 1896, petitioner filed an application in said court for a rehearing, and the same was, on the 24th day of November, 1896, overruled by said court; all of which will more fully appear from certified copies of said judgment of the said last-named court and the application for rehearing and of the order made thereon by said court.

369 Petitioner alleges that said cause is not one in which the jurisdiction of the said circuit court of or said circuit court of appeals depended entirely upon the diverse citizenship of the parties thereto; but that the plaintiff and one of the defendants, to wit, J. J. Dickerson, were at the time of the institution of said suit citizens of the same State, namely, the State of Texas, and jurisdiction of said courts as to him depended upon the fact that the said Dickerson was at the date of the trespasses and wrongs complained of by the plaintiff in said cause United States marshal and was sued for an alleged trespass committed by him, as such marshal, in seizing the property of said plaintiff under an attachment writ in his hands as said marshal sued out in said circuit court against the property of the firm of Freiberg, Klein & Co., the defendants in said attachment suit; and the said Dickerson, by way of answer in said cause, justified said seizure under authority of the writ directed to and held by him as United States marshal and executed by him as such by levying upon and seizing said property. See accompanying Transcript, pp. 1, 2, 51, 52, 86, 87.

Petitioner further alleges that the jurisdiction of the circuit court and of said circuit court of appeals in said cause was not final, but that he is entitled, under the laws of the United States creating said court, to a writ of error to be issued by the honorable Supreme Court of the United States, the amount in controversy in said cause being over one thousand dollars.

He alleges that in the judgment and proceedings of the cause in said circuit court of appeals, as well as in the circuit court from which the same was taken to said circuit court of appeals by writ of error, there are numerous and divers errors which should be revised and reviewed by your honorable court, and for which the said judgment should be reversed.

He therefore prays that a writ of error may issue from your honorable court directed to said circuit court of appeals, and that the transcript of the record, proceedings, and papers upon which

370 said judgment was affirmed in said circuit court be sent to your honorable court, hereby offering to comply with such terms as may be required for the purpose of obtaining said writ.

JACOB SONNENTHEIL,
By A. H. WILLIE.

(Endorsed:) Filed December 8th, 1896. J. M. McKee, clerk.

*Assignment of Errors.*

JACOB SONNENTHEIL, Plaintiff in Error,
*vs.*
THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON, Defendants in Error.

Error to the circuit court of appeals of the United States for the 5th circuit.

Jacob Sonnentheil, plaintiff in error in the above-entitled cause, respectfully assigns the following as the errors in the record and proceedings therein of the United States circuit court for the eastern district of Texas, wherein said cause was originally tried, hereinafter styled "the trial court," and in the judgment of the circuit court of appeals of the 5th circuit, wherein the erroneous rulings, judgment, and proceedings of said trial court were in all things affirmed:

First. The trial court erred in admitting in evidence over the objection of plaintiff's counsel the following document:

371 (On the letter-head of Freiberg, Klein & Co.)

"JANUARY 16TH, 1893.

"Mr. E. Brown:

"Please accept order of Freiberg, Klein & Co. for $180 on policy, and oblige,

"Respectfully, JAMES E. BURKE."

"Messrs. Freiberg, Klein & Co.

"DEAR SIRS: James E. Burke has assigned an insurance policy to me. As soon as I collect the same, I will hold out for you $180.

"Respectfully, E. BROWN."

(Then follows:)

"Paid the above in full.

FREIBERG, KLEIN & CO.

2, 23, '93."

The pleadings and evidence show that the plaintiff claimed damages for the seizure by Dickerson as United States marshal, of a stock of goods formerly belonging to the firm of Freiberg, Klein & Co., and conveyed by that firm to plaintiff, as trustee, for the benefit of certain preferred creditors, and which had been seized by the marshal under writ of attachment issued at the instance of the defendant, The Christian Moerlein Brewing Company, a creditor of Freiberg, Klein & Co., not secured in the deed of trust. The documents were offered in support of the defence that the deed of trust was made with intent to hinder, delay and defraud the unsecured creditors of Freiberg, Klein & Co., it being claimed by defendants that these documents showed that Freiberg, Klein & Co., were col-

lecting for their benefit some of the assets of the firm. It had been proved that the deed of trust in question was executed, delivered and accepted by the trustee and beneficiaries prior to the levy upon the goods and long prior to the date of either of said documents, and plaintiff's counsel objected to their admission in evidence on the ground that they relate to a transaction subsequent in point of time to the deed of trust and the trustee was not shown to have any knowledge thereof, which facts were established by the evidence. The objection was overruled by the court and the letters read in evidence to the jury.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Second. The trial court erred in admitting in evidence the following entry in the books of Freiberg, Klein & Co., viz:

"Profit and loss to cover difference in cash occasioned by amount short in various ways during absence, etc., since February 1891, $2,416.47," which was proved to have been made by Seinsheimer, one of the firm of Freiberg, Klein & Co., on or after December 24th, 1892, and subsequent to the execution, delivery and acceptance of the *such* deed of trust and its admission in evidence was objected to by plaintiff's counsel for that reason; and further, because
372 the entry related to cash shortage from February, 1891 to date of entry, and the said deed of trust gave the trustee no interest in the cash whatever, and he had no right to claim from Freiberg, Klein & Co., any cash and the entry was the mere admission after the fact by a person who may have been interested in keeping a memorandum of a matter with which the plaintiff had nothing to do. The meaning of the entry was shown to be that this amount of cash was short in the mercantile transactions of Freiberg, Klein & Co., since February, 1891, and it had been charged to profit and loss.

Seinsheimer was acting as book-keeper for plaintiff after he took possession under the deed of trust. During the time he thus acted he also made entries in the books of Freiberg, Klein & Co., which had been turned over by said firm to said trustee. Whilst plaintiff knew that he was making entries in these books, he did not know what such entries were, not having any interest whatever in such entries. He kept a separate set of books in which were entered all the transactions relating to his trust, and looked into the books of Freiberg, Klein & Co., only for the purpose of finding out what belonged to him as trustee, or to get the items of an account when it was to be settled and for no other purposes.

The plaintiff's objections were overruled and the evidence admitted subject to being controlled thereafter by the court. But the court neither by the charge or otherwise excluded or in any manner alluded to the evidence thereafter during the trial.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Third. The trial court erred in admitting in evidence the following matters:

1. Entries in the books of Freiberg, Klein & Co., showing a charge

of $5,000 against L. Fellman, which was one taken from those books and entered in those of the trustee.

2. Correspondence between the trustee and Fellman, which took place in May after the deed of trust was executed, in which the trustee notified Fellman of this charge against him and demanded payment of the amount, and Fellman replied that the $5,000 was used by him to pay off a claim held by H. Kempner against Freiberg, Klein & Co., upon which Fellman was surety and which was secured by collaterals of little value and he did not propose to pay the firm or the trustee anything until all the paper had been satisfied. The trustee was advised by his counsel not to file suit against Fellman, but make him give an account of the securities he held against the claim.

In connection with this entry and correspondence there was read a deed of trust from Freiberg, Klein & Co. to J. J. Eckford, securing Kempner for a debt of $5,000 by lien upon property in Dallas, Texas. Two notes of $2,500 each, signed by Freiberg, Klein & Co., and Fellman & Grumbach, payable to the order of the makers and endorsed by them, and marked on the back: "Paid by L.
373 Fellman. K. Kempner." One of the notes was due Dec. 30, 1892, and the other Dec. 18, 1892, and both were payable to the order of the makers.

Also an abstract of a judgment of G. Edloff *vs.* G. C. & S. F. R'y Co., and A. T. and S. F. R. R. Co. for $2,462.59, dated April 25, 1893, which judgment was shown to have been one of the collaterals securing the above debt, and to have been transferred by Fellman to the trustee upon the latter paying Fellman the amount advanced by him in the matter of the Eckford collaterals and said judgment being all that was left of the Eckford security after paying expenses. The trustee took this judgment from Fellman and still had it in possession. It was shown that Fellman was security for Freiberg, Klein & Co. on a large amount of their indebtedness, besides the Kempner claim. The trustee never knew anything of the deed of trust and there was no evidence that the accepting creditors had any notice of it.

Plaintiff objected to the introduction of each and every portion of the above evidence, because it was irrelevant and referred to matters occurring after the deed of trust to Sonnentheil had taken effect, and could not affect the validity of the same or the interest of the trustee or the beneficiaries under the deed of trust, which objections were overruled by the court.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Fourth. The trial court erred in admitting in evidence over the objection of plaintiff for irrelevancy, and being a matter occurring subsequent to acceptance of the deed of trust, the following letter of H. Kempner to J. J. Eckford, in reference to the Eckford deed of trust:

"Mr. J. J. Eckford, Dallas, Texas.

DEAR SIR: In the matter of Messrs. Freiberg, Klein & Co., Mr.

Jacob Sonnentheil, of this city, is trustee for all their *assets*, property and assets, and the property assigned for my benefit in Dallas, all proceeds of sale should be accounted for and paid to him. Please deliver or pay to the order of Mr. Jacob Sonnentheil, trustee of Messrs. Freiberg, Klein & Co., all matters, money, etc., in your hands which have been or will now be held for my benefit.

Yours truly, H. KEMPNER."

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

374 Fifth. The trial court erred in admitting evidence to show that a debt to the Citizens' Loan Company secured in the deed of trust to Sonnentheil had been paid since the deed of trust had taken effect over the objection of plaintiff that such evidence was irrelevant and referred to transactions occurring after the deed was accepted.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Sixth. The trial court erred in allowing the witness Grelling to read to the jury a statement made by him whilst book-keeper of Freiberg, Klein & Co., to Dun's agency of the condition of the firm on Sept. 29, 1892, which statement showed the assets of the firm to be $391,184.74 and their liabilities in notes and accounts $182,561.38; the witness further testifying that this statement was made and handed to him by Seinsheimer, one of the said firm, and was taken by the witness to Dun's agency by direction of Seinsheimer, and that the statement was not true as he did not think the firm was solvent at the time; and that the firm went on and bought and sold goods after making this report, buying some from the said Christian Moerlein Brewing Company and that the firm could not have continued in business if a true report had been made to the agency.

To which evidence plaintiff objected for the reason that neither the plaintiff nor any of the beneficiaries in the deed of trust had been connected with any such representations and said trustee and beneficiaries had no knowledge of the same at or before the time when their rights vested under the deed of trust made to Sonnentheil by Freiberg, Klein & Co., but the court admitted the evidence.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

375 Seventh. The trial court erred in allowing the witness Grelling to read to the jury a paper which he said he judged was a copy from the record of Dun's agency report made to said Dun's agency on March 14th, 1891, by Freiberg, Klein & Co., showing the assets of the firm to exceed its liabilities, $209,157.09, the witness stating that the report was false and the firm at that time, in his opinion, insolvent.

Plaintiff objected to the reading of this report, for the reason that neither the plaintiff nor any of the beneficiaries under the deed of trust had been connected with any such representations and no one of them had any knowledge or notice of the same when the deed of trust was accepted.

And for the further reason that the paper offered was a mere copy which in the judgment of the witness was taken from the books of Dun's agency and the books were better evidence. But the court overruled the objections and admitted the evidence.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Eighth. The trial court erred in allowing the witness Grelling to read to the jury a like copy of report made by Freiberg, *to* Klein & Co. to Dun's agency on February 13th, 1892, from which it appeared that the assets of said firm exceeded its liabilities $200,987.42, whereas in the opinion of the witness it was insolvent.

Plaintiff's counsel objected to the reading of this report because it was not shown that either the trustee or any of the beneficiaries had any notice of the same when the deed of trust was accepted, and also because the paper purported to be a copy from the books of Dun & Co. which were better evidence. But the court overruled the objection and admitted the statement.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Ninth. The trial court erred in admitting in evidence the statements of Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deed of trust, in which Freiberg is said to have asked him, Werner, as agent of the Moerlein Brewing Co. to give him, Freiberg, the agency for the sale of beer, and saying that after they got a settlement they
376 would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that they had to fail, which evidence was objected to on the ground that — was hearsay and *res inter alias acta*, it related to facts which occurred after the deed of trust was made; and not shown to have been known or assented to by the trustee or beneficiaries of the deed of trust and was incompent to affect their interests. But the court overruled the objection and admitted the evidence.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Tenth. The trial court erred in allowing Mose Freiberg, one of the firm of Freiberg, Klein & Co., and a witness in behalf of the defendant- to testify over the objections of plaintiff, in substance, as follows:

The firm of Freiberg, Klein & Co., were embarrassed in February, 1891 and had to scale a large amount of its indebtedness by paying a portion of the same out of the private means of the partners and obtaining a remission of a portion of the remainder; that this put them ahead financially and enabled them to continue business; that within two months afterwards they were again unable to meet their obligations and held a conference with Fellman & Grumbach, who were their endorsers to the extent of about $135,000.00 and with Harris Kempner, another endorser, at which Feilman stated that he was endorser also on a large amount of other paper, and if the firm failed then, he would break; and it was agreed that it should continue business and try to pull through, but if it failed Fellman

should be protected at all hazards by a bill of sale to him of its stock and business whenever the members found that they could no longer meet their obligations. Fellman expected a large amount of the firm's paper to be retired and therefore insisted on its continuing in business. The firm was then solvent but embarrassed. They continued buying and selling as usual and in February, 1892, found their business in bad shape. It was perilous to their creditors to continue busin-ss and it would take extraordinary good fortune to pull through. Rumors as to their failing condition impaired their credit in the spring and summer of 1892. They boucht — credit when they could and paid cash when they could not and continued to do thus down to within a few days of their failure.

In December, 1892, when they found they could no longer continue business, they telegraphed to Fellman to come home, their object being to raise money through him to meet their debts or to sell out to him as agreed on.

He came to Galveston, and in a conversation with the witness a few days before the failure, told the latter that after he had bought them out, the witness might run the business in Fellman's
377 name till he could settle with his creditors and Fellman would see that he got money enough for that purpose. The original agreement was to dispose of the stock by bill of sale, but at the last moment it was changed to a deed of trust, which Fellman preferred. Seinsheimer was brother-in-law to Kempner and Grumbach and son-in-law to Fellman.

After the attachments were levied, witness requested Fellman to replevy the stock or buy it out as promised, but he refused, as also to put up $25,000 to enable the firm to settle with their creditors.

Witness also testified that the 2nd deed of trust was made on the Sunday following the execution of the first deed; that previous to making the first deed of trust the firm made a deed of conveyance of real estate direct to Fellman for $10,000 cash, and he considered the property thereby conveyed to be worth twelve or fifteen thousand dollars and the deed was made in anticipation of the bill of sale or deed of trust. He considered the property transferred to Sonnentheil in the deed of trust worth $225,000.00 or $75,000 more than the debts secured.

That $20,000 of the notes transferred were withheld from the list by Seinsheimer, but upon demand of the trustee were turned over to him.

As to the Eckford deed of trust in favor of Kempner, he stated that he did not know that the firm owed Kempner anything, but supposed the deed was to secure an indebtedness to Fellman.

To the admission of which testimony the plaintiff objected because it was not shown by the evidence that either the beneficiaries in the deed of trust or the trustee Sonnentheil, at or before the execution of said deed and the acquisition of their rights thereunder, had any knowledge, or were chargeable with notice, of the matters testified to by the witness: and as the witness had answered upon cross-examination that neither the trustee nor any of the creditors

secured in the deed of trust knew of any of the conversations or transactions he had testified to as occurring prior to or at the time of the making of the deed of trust, between the firm of Freiberg, Klein & Co., or any of its members and Fellman, or Fellman & Grumbach, the testimony so far as such conversations and transactions were concerned was further objected to because of such want of knowledge or notice on the part of said trustee or beneficiaries, but the court overruled both of said objections.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

378 Eleventh. The trial court erred in allowing the defendants to read as evidence to the jury over the objections of plaintiff's counsel the statements contained in the depositions of E. H. Gorse, a witness for defendants in answer to direct interrogatories propounded to him by defendants, which evidence was substantially as follows:

That in 1891 and 1892 witness was manager for R. G. Dun & Co.'s commercial agency, and that Grelling, the book-keeper for the firm of Freiberg, Klein & Co. on February 13, 1892, made a statement to said agency showing the assets of the firm to be $407,828.26 and their liabilities $206,840.84 and that they made another statement Sept. 29, 1892, showing their assets to be $391,184.74 and their liabilities $182,561.38. L. A. Grelling made the statements at the instance of Seinsheimer. Large firms made statements once a year, but this additional statement was required of Freiberg, Klein & Co., because it was rumored that they were shaky and their credit suffering. The foregoing statements are copies from the books of Dun's commercial agency in the office of the agency. Their financial condition was inquired about by merchants in the North and East and rumors as to the same were discussed among brokers, bankers and merchants. This made him desire to post himself further as to their foundation and he inquired generally with somewhat unsuccessful results as Grelling and Seinsheimer misrepresented the condition of the firm and bankers were not willing to tell the truth about the firm's affairs as far as related to the banks. These rumors were of sufficient importance to suggest a rigid examination by interested parties.

Witness also attached a statement of the assets and liabilities of Freiberg, Klein & Co., dated March 14, 1891, which he said was a copy of a statement made by Grelling to the agency at the instance of Seinsheimer on Feb. 1, 1891. Being asked in cross-examination to state through whom he heard the rumors about Freiberg, Klein & Co.'s condition about Sept. 1892, he declined to answer, saying that to do so would be a breach of faith. He also stated that it was his duty to investigate such rumors and to know and note their sources, basis and origin.

The objections to the answers of the witness to direct interrogatories were—

To so much as related to statements made by Freiberg, Klein & Co., to Dun's agency because, first: the matters testified to were not shown to have been known to either Sonnentheil, the trustee or the

beneficiaries under the deed of trust of Dec. 16, 1892, at or before the acquisition of the rights of said beneficiaries under said
379 deed. Second, because the testimony related to and embraced copies of original documents not shown to have been lost and not produced or otherwise accounted for, and which were better evidence than the copies.

To so much of said evidence as referred to rumors and the sufficiency of said rumors to induce critical investigation by parties interested, because—

First. The testimony was as to conclusions of witness and not facts upon which the jury could form its conclusions as to the sufficiency of said rumors.

Second. Because the witness on cross-examination refused to give the particulars of such rumors, so as to enable the jury to form their conclusions thereupon.

And as to all said depositions so far as they related to rumors about Freiberg, Klein & Co.'s standing and ability, because the witness when cross-examined, particularly as to said rumors, and his source of information refused to answer in respect thereof, or to give the particular facts. The defendants, in answer to said objections put in evidence, the original report of the said agency of September 29, 1892, which corresponded with the copy, testified to by the witness.

Whereupon, the court overruled plaintiff's objections and allowed said testimony to be read to the jury.

And said circuit court of appeals erred in affirming said erroneous ruling of the trial court.

Twelfth. The trial court erred in refusing to give the following instruction asked by plaintiff's counsel:

"The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, the *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown, that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed and converted them to the use of said brewing company. You are therefore instructed to find a verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of six per cent. per annum from the date of such
380 seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized.

Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

It having been shown by the uncontradicted evidence that the deed of trust under which the plaintiff claimed title in this case to the goods seized by the defendant, J. J. Dickerson, under an attachment sued out by his codefendant, The Christian Moerlein Brewing Company, and to recover damages for which this suit was brought, was a valid instrument on its face, and so held by the judge before whom the cause was tried; that all the debts secured thereby were the *bona fide* debts of Freiberg, Klein & Co.; that several of the creditors secured by said deed had accepted the same before the levy of the attachment of the Christian Moerlein Brewing Company, among others A. W. Fly, S. A. Walker, Adoue & Lobit, the First National Bank of Galveston, the Island City savings bank and the Citizens' Loan Company; and there was no evidence whatever that either of said parties knew of such intent of Freiberg, Klein & Co., in making said deed, or knew of any fact calculated to put them upon inquiry as to any fraudulent intent in making said deed, but the positive testimony being directly to the contrary, the defendants' witness Freiberg having testified that neither of said beneficiaries knew anything of the circumstances detailed in his testimony which were relied on by defendants to show fraud in the deed, and the utmost extent of the facts brought to their knowledge being rumors that the firm was insolvent, and any inquiries prosecuted by them would have led up to no fact as to the deed of trust other than appeared upon its face and that the makers of it were insolvent when it was executed.

It was also proved that the United States marshal, the defendant Dickerson, under an attachment sued out by the Moerlein Brewing Company his codefendant had by direction of said company seized the goods in question in this case and taken them from plaintiff Sonnentheil, who held them at the time as trustee for the creditors named in said deed, and had converted them to the use of said company.

It had been further shown what the goods thus seized would have been sold for at wholesale at the city of Galveston, the place of seizure, at the time of seizure, and the defendant- had introduced evidence for the purpose of showing their cost price in distant markets and the cost of their transportation; as also what they actually brought when sold at public auction. The whole evidence required a verdict for the plaintiff and the court should have left nothing to the jury except the amount of damages to be recovered.

And the circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

381 Thirteenth. After refusing to give the foregoing, the trial court erred in refusing to give the following special instruction asked by plaintiff's counsel, numbered 5th special instruction:

"On the question of alleged notice of said alleged fraudulent in-

tent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts, as would have caused a reasonably prudent man to have acquired into such intent and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them upon inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent, then they would not be chargeable with notice of such intent, unless they had knowledge of it."

The evidence having established the acceptance of the deed of trust by several of the preferred creditors prior to the levy of the attachment and evidence having been admitted over the objection of plaintiff's counsel to the effect that there were rumors in Galveston, prior to the failure of Freiberg, Klein & Co. as to the insolvency of said firm, which rumors may have been heard by the said creditors, and the court below having failed to instruct the jury as to the effect of a knowledge on the part of such creditors of the insolvency of said firm, acquired by them before acceptance of the deed of trust, plaintiff's counsel asked the above instruction to the jury, which was refused.

And said circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

Fourteenth. The trial court erred in refusing to give the 6th special instruction asked by plaintiff's counsel, which is as follows:

"On the question of acceptance, I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word accept in accepting the deed of trust. A creditor who communicated to the trustee or to Freiberg, Klein & Co. his willingness to accept the security and benefits provided for him in the deed of trust,
382 accepted the same. A corporation necessarily acts through agents and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City savings bank, the Citizens' Loan Company and the First National bank, and he had authority from them either express or implied to do so, the said corporations accepted. In considering his authority you will consider the offices he held, his previous conduct of the said offices and the sanction, if any, accorded by the said corporations to his acts of similar nature and to his acceptance, if any, in this matter."

It was proved that M. Lasker accepted the deed of trust claiming to be the agent of the following creditors secured thereby: The First National Bank of Galveston, the Island City savings bank, and the Citizens' Loan Company. It was proved that at the time he was vice-president and chairman of the committee of finance of the first-named bank and a member of the finance committee of the two other corporations; that he had charge of the financial matters of the bank, especially those pertaining to loans and securities, and

that his action in reference to all such matters had never been repudiated by either of the corporations for whom he acted, but always approved, and the charter and by-laws of said corporations showing that there was no provision in any of them prohibiting them from allowing such agent *from* accept*ing* a deed of trust for the bank's benefit or conferring special authority upon any other agent to perform this service.

And the circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

Fifteenth. The trial court erred in refusing to give to the jury the following instruction asked by plaintiff's counsel, numbered 6*a*, which is as follows:

"6*a*. The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument."

383 The defendants having introduced testimony to show, that after the acceptance of the deed by several of the beneficiaries therein, some of the members of the firm of Freiberg, Klein & Co. had attempted to get possession of some of the assets of the firm for their own benefit and had made improper entries on the books of that firm, without the consent of any of such beneficiaries and the court in its general charge had failed to instruct the jury that such conduct, if fraudulent, could not affect the validity of the deed as to such accepting creditors, which evidence the court had admitted over the objection of plaintiff's counsel.

And the circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

Sixteenth. The trial court erred in refusing to give to the jury the 7th special instruction asked by plaintiff's counsel, which is as follows:

"7. The fact that a debt secured by a deed of trust is also secured by personal indorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as an indorser upon his claim when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman, *the deed and his acceptance thereof. The fact that Fellman*, or Fellman & Grumbach may have been guilty of fraud must not affect your verdict; if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's

endorsement. The fact that Fellman, or Fellman & Grumbach may have, subsequent to the attachment, paid off some of the claims secured by their endorsement, must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman, or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account of the claims they have paid, that is a matter that cannot be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose."

384 The defendants had introduced testimony tending to show that Fellman, who was one of the endorsers upon some of the claims secured in the deed of trust, had participated in some of the frauds alleged to have entered into the making of the deed of trust, and that, as to the claims on which he was endorser, the deed was intended to secure him, and the evidence failing to show any knowledge on the part of any of the beneficiaries in the deed, whether those who held claims upon which Fellman was endorser or those upon which there was no endorsement, of any fraud whatever in said deed, or of any facts sufficient to put them upon inquiry as to such frauds or any other, and the court having failed in its main charge to instruct the jury upon the point covered by this instruction.

And the circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

Seventeenth. The trial court erred in refusing to give to the jury the 8th special charge asked by plaintiff, which is as follows:

"8. I have necessarily admitted evidence, which at the time it was offered I could not foresee the relevancy of. Such for example as the testimony relating to Seinsheimer's misconduct toward his partners, and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff."

The court had admitted over the objections of plaintiff evidence to show that Seinsheimer, one of the firm of Freiberg, Klein & Co., had before the execution of the deed made false representations to a commercial agency, to the effect that Freiberg, Klein & Co. were solvent when in fact it was insolvent, and thus obtained credit for merchandise when it would otherwise have been refused, and the evidence failed to show that either of the beneficiaries named in the deed of trust knew of such false representations, or were put upon inquiry of the same; and it had admitted other evidence tending to show an intermeddling of a member of the firm with its assets of the firm to prevent their coming into the hands of the assignee, without showing any connection of either the assignee or any of the beneficiaries of the deed, or any knowledge or notice on their part of such transactions before the acceptance of the deed of trust.

385 And the witness Freiberg had also been allowed to testify that during the active existence of the firm of Freiberg, Klein & Co., Seinsheimer, one of its members had abstracted and appropriated funds of the firm to his own use and concealed the facts by false entries and figures in the books of the firm.

And the circuit court of appeals erred in sanctioning and affirming the refusal of said trial court to give the above-recited charge.

Eighteenth. The trial court erred in giving the following clauses of its general charge to the jury:

"* * * you are instructed that in this case, if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment—which bear in mind was the 23rd Dec., 1892—and you further believe from the evidence that any creditor named in that instrument had accepted benefits of this deed of trust prior to the 23rd day of Dec., or on that date—prior to the levy of the attachment and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from the testimony that creditor- had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff. * * *"

"* * * if you don't believe these creditors accepted, or any of them before the attachment was levied, you will return a general verdict for the defendant-, but if you find some of the creditors or any of them did, or any of them before the attachment, then you are to inquire into the question whether fraud existed or not. * * *"

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiff for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now.

In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston; two
386 living at a distance and some of them represented here in Galveston; and you have the right to look to the relations of the parties, and all the circumstances surrounding them in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors if there were any knew of it, or of the facts that would have put a reasonably prudent person on inquiry."

Because in and by means of said clauses the court left the jury to determine whether or not any of the beneficiaries in said deed of trust had accepted the same before the levy of the attachment of

the Moerlein Brewing Co., whereas, the question of acceptance *vel non* was a question of law to be determined by the court, but if a question of fact positive and uncontradicted evidence in the cause fully established the acceptance of said deed of trust prior to the levy of said attachment by the trustee plaintiff in this cause, and thereafter formal and affirmative acceptance thereof by the beneficiaries in said deed of trust was unnecessary to give effect thereto, and moreover said positive and uncontradicted evidence fully established the acceptance of said deed of trust, prior to said levy of said attachment by A. W. Fly, S. A. Walker, Adoue & Lobit, the Citizens' Loan Co., the First National Bank of Galveston, and the Island City savings bank, and by each of them and all of said parties were shown to be the holders at the date of said deed and acceptance of *bona fde* debts against the makers of said deed, which were secured by the same and the plaintiff in the charges set forth in the 12th assignment of error had asked for a charge removing the question of acceptance from the jury, which charge had been refused by the court.

And said circuit court of appeals erred in sanctioning and affirming said erroneous sharge.

Nineteenth. The trial court erred in giving the following clause of its general charge to the jury, viz:

"If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you, then you are to extend your investigation and if the fraud (if you find it) was fraudulent you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent, or whether they had information that would have led to the detection of the fraud that would have put a reason-
387 ably prudent person upon inquiry, and upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of the jury, that is what you are here for; the disputed questions of fact; you are the judges of the weight of the evidence and the credibility of the witnesses and thus being the judges you are to determine who has told the truth and who has not; and in doing that, you have the right to take into consideration the interest of the parties, you have a right to take into consideration the manner of the witnesses on the stand; in fact, you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there but do what you think is right and just under the law; you must regard the law as your guide, we all bow to it, whatever the law may be, otherwise there would be no law."

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the

attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent. per annum from that date until now."

"On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said accepting creditors knew of said fraud, in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry, in that event you will return a verdict for the defendants."

"What I mean is this: If you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment and that such creditor was not guilty of fraud himself, and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff, but, on the other hand, if you find that the creditor, or creditors had accepted said deed of trust before the levy of said attachment and were either guilty of fraud themselves or were possessed of information
388 that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant-."

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston—two living at a distance and some of them represented here in Galveston; and you have the right to look to the relations of the parties, and all the circumstances surrounding them in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors if there were any knew of it, or of facts that would have put a reasonably prudent person on inquiry."

Because the said clauses of the charge left to the determination of the jury the fact as to whether or not any of the beneficiaries in said deed of trust had knowledge of the fraudulent intent, if any there was, in the making of the same, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of such fraudulent intent, if it existed, or that tney were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence, but on the contrary, the uncontradicted evidence was that they had no knowledge when they accepted such deed of such fraud, if any there was, or of any fact that would have put them upon inquiry in reference to the same, and the plaintiff had asked of the court, as shown in the 12th assignment of error, a charge to the effect that there was no such evidence in the case.

And said circuit court of appeals erred in sanctioning and affirming said erroneous charge.

Twentieth. The verdict of the jury and the judgment rendered in the cause were unsupported by the evidence produced at the

trial, and said verdict and judgment should have been in favor of the plaintiff instead of the defendants. The following facts, as appears by the bills of exceptions approved by the trial judge, were established in evidence:

1. That the plaintiff, Sonnentheil, was, on the 23rd of December, 1892, in possession of the property to recover the value of which this suit was brought, holding it under a valid deed of *deed of* trust executed to him as trustee by the firm of Freiberg, Klein & Co. to secure the payment of certain *bona fide* debts due to creditors named in said deed.

2. That several of said secured creditors had duly accepted said deed of trust before that date.

389 3. That after such acceptance and whilst plaintiff was in possession of said property under the deed, it was seized and taken out of his possession by the defendant J. J. Dickerson, as United States marshal, and under and by virtue of a writ of attachment sued out in the circuit court of the United States for the eastern district by the defendant, The Christian Moerlein Brewing Company, said seizure and dispossession being directed by said company, the plaintiff in attachment claiming that said property belonged to said Freiberg, Klein & Co.

4. That Fellman and Grumbach were endorsers upon some of the debts secured in the deed of trust, but some of said debts were not endorsed by them, or any one else, or secured in any way except by said deed of trust.

5. Even conceding that there was proof tending to show that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay, or defraud the creditors not secured in the deed, and that Fellman participated therein, it was proven positively that none of the beneficiaries in said deed before acceptance of the same knew of any such fraud and there was no evidence whatever tending to show that before accepting said deed of trust, either those who held Fellman & Grumbach's endorsement on their paper, or those who did not, knew of any fraud in the making of said deed, or of any facts which would put them upon inquiry as to fraud in the same, or that any inquiries they could have made would have led up to a knowledge of any fraudulent intent with which said deed was executed.

6. The value of the goods at the time and place of their seizure by the marshal was proven.

And said circuit court of appeals erred in approving and affirming such verdict.

Twenty-first. Said circuit court of appeals further erred in holding that the only question submitted to it for decision on appeal was as to the action of the trial court in refusing the charge hereinbefore set forth in the 12th assignment of error, whereas the correctness of the rulings of the trial court on the several matters of evidence aforesaid and the several charges refused and given by that court were made the subject of the assignments of error and the brief of counsel submitted to that court.

390 Twenty-second. Said circuit court of appeals further erred in holding that the charge made the subject of the foregoing

12th assignment of error asked the court to make five or any other number of special findings of fact, when it merely asked the court to instruct the jury to find a verdict for the plaintiff upon the uncontroverted evidence.

Twenty-third. The circuit court of appeals erred in not reversing the judgment rendered for defendants by the trial court and remanding said cause to said court for a new trial.

For all and each of said errors plaintiff in error prays that the judgments of the circuit court of the eastern district of Texas and of the circuit court of appeals of the 5th circuit be reversed and the cause remanded for a new trial in said trial court.

ASA H. WILLIE AND
THOMAS J. BALLINGER,
*Attorneys for Jacob Sonnentheil, Plaintiff in Error.*

(Endorsed:) Filed December 8, 1896. J. M. McKee, clerk.

391 *Writ of Error Bond.*

Know all men by these presents that we, Jacob Sonnentheil, as principal, and Sylvain Lion and William Krail, as sureties, are held and firmly bound unto The Christian Moerlein Brewing Company and J. J. Dickerson in the full and just sum of five hundred dollars, to be paid to the said The Christian Moerlein Brewing Company and J. J. Dickerson, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a regular term of the circuit court of the United States for the eastern district of Texas, at Galveston, in a suit depending in said court between Jacob Sonnentheil, plaintiff, and The Christian Moerlein Brewing Company and J. J. Dickerson, defendants, numbered 1702 upon the law docket of said court, a judgment was rendered against the said Jacob Sonnentheil, plaintiff, on the 13th day of November, 1895, and the said Jacob Sonnentheil obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Christian Moerlein Brewing Company and J. J. Dickerson, citing and admonishing them to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days of the date thereof:

And whereas, on the 9th day of June, 1896, the said judgment of the circuit court for the easter- district of Texas was by the said circuit court of appeals considered on said writ of error and in all things affirmed, and on the 24th day of November, 1896, an application of said Sonnenthiel for a rehearing of said cause was by said court of appeals overruled;

392 And whereas said Sonnentheil has applied for and obtained a writ of error from the Supreme Court of the United States to said court of appeals to reverse the judgment of said court affirming the judgment of said circuit court of the eastern district of Texas:

Now, the condition of the above obligation is such that if the said Jacob Sonnentheil shall prosecute said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JACOB SONNENTHEIL.
SYLVAIN LION.
WILLIAM KRAIL.

Acknowledged before me this 16th day of Dec., 1896, by Jacob Sonnentheil, Sylvain Lion, and William Krail.

Witness my hand and official seal.

[L. S.] C. DART,
*Com'r U. S. Circuit Court, Eastern District of Texas.*

Approved:
E. D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

Dec. 21, 1896.

I, Sylvain Lion, do swear that I am worth in my own right at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more. SYLVAIN LION.

393 Sworn to and subscribed before me this the 16th day of December, A. D. 1896. As witness my hand and official seal.

[L. S.] C. DART,
*Commissioner U. S. Circuit Court, Eastern District of Texas.*

I, William Krail, do swear that I am worth in my own right at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county, State of Texas, and have property in said State liable to execution worth five hundred dollars or more.

WILLIAM KRAIL.

Sworn to and subscribed before me this 16th day of December, A. D. 1896. As witness my hand and official seal.

[L. S.] C. DART,
*Commissioner U. S. Circuit Court, Eastern District of Texas.*

I hereby certify that the sureties upon the foregoing bond are well known to me and, in my opinion, are good and sufficient for the penalty thereof, and if said bond were offered to me in a similar case I would approve the same. To certify which, witness my hand and seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this 16th day of December, 1896.

[L. S.] C. DART,
*Clerk U. S. Circuit Court, Eastern District of Texas.*

394 *Opinion.*

(Filed June 9, 1896.)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1895.

JACOB SONNENTHEIL, Plaintiff in Error,
*v.*
THE CHRISTIAN MOERLEIN BREWING COMPANY *et al.*, Defendants in Error.

Error to the United States circuit court, eastern district of Texas.

Before Pardee and McCormick, circuit judges, and Speer, district judge.

MCCORMICK, circuit judge, delivered the opinion of the court:

This case is brought to us on writ of error to the *the* circuit court for the eastern district of Texas. The statement of the evidence embraced in the bill of exceptions covers 169 full octavo pages of the printed record. The general charge of the court covers 9 pages of the same printed record, and the assignment of errors covers more than twenty pages. The distinguished gentlemen who appear as counsel for the parties have filed printed briefs of their respective propositions, authorities, statement of the evidence and argument thereon, admirably condensed and able, covering the one 54 pages and the other 55 pages. The respective counsel have also been fully heard in oral argument. From all of which it clearly appears that the only alleged error in the trial in the circuit court of which the plaintiff now complains is the failure of the trial judge to direct the jury to find for the plaintiff and leave
395 to the jury only the matter of assessing the damages. On this point the plaintiff requested the court to charge as follows: "The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been at the time of its execution the *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed or had any cause to suspect

that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by The Christian Moerlien Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed, and converted them to the use of said brewing company. You are therefore instructed to find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon, at the rate of six per cent. per annum, from the date of such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized; neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

There was no error in refusing this request. It asks much more than the giving of the general charge. We have had occasion in several cases to notice and dissap-rove the practice of attempting by a request for the general charge to practically convert severely contested actions at law into suits in equity, and thus force on the judge of the circuit court the work of trying complicated issues of fact without the aid of a master or that opportunity for time
396 to consider which a hearing in equity affords, resulting, when judgment goes against them, in their bringing up all the evidence in its amplest detail to this court as if the case was here on appeal. If by stipulation a jury had been waived and the trial had proceeded before the judge alone, neither party could have demanded or rightly asked the judge to make special findings of fact. Baer *v.* Key West, Fed. Rep. This request not only asks the court to make at least five special findings of fact, but that the findings shall be in favor of the plaintiff. It may have been the duty of the court to instruct the jury as to the legal effect of the written instrument relied on in the case as a deed of trust if the court had not already instructed the jury on that subject as follows: "I have inspected this deed of trust and my opinion is that upon its face it is a legal instrument; that upon the execution and delivery of that instrument to Mr. Sonnentheil that it vested the title in Mr. Sonnentheil—the title therein named—for the purposes therein named." As a request for a charge as to the measure of damages it was rightly refused because it was fully embraced in the general charge in terms of which the plaintiff could not and does not complain; to illustrate which we quote from the general charge as follows: "Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before the attachment is levied, the trustee cannot recover, but if any creditor has accepted the terms of the instrument before the attachment has been levied the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you, and ably, upon both sides; well presented by the attorneys for

the parties on both sides. The contention has been that even if some one creditor did accept that the trustee could recover only to the extent of the debt thus accepted. The other party has contended that that was not the law; we being in a court of law, that you could not marshal assets and have an adjustment of the equities; that consequently it was legal or illegal. I agree with
397 the latter contention. I hold as a matter of law that if you find as a matter of fact that if any creditor accepted the terms of this instrument before the levy of the attachment and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed the entire property named in this deed passed to the trustee, and for this action he may recover for whatever *they* it may be shown the property was worth at the time and place it was taken. * * * I mean if you believe from the evidence that there is a single excepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co. and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23rd day of December, 1892, in Galveston, Texas, with interest, at the rate of 6 per cent. per annum, from that date until now." We express no opinion as to the instructions just quoted further than to say, as we have above said, that the plaintiff does not and cannot complain of them. Our conclusion on the case is that the plaintiff does not suggest and now urge any error in the rulings of the circuit court for which its judgment should be reversed, and it is therefore—

Affirmed.

398 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 398 pages, numbered from 0 to 397, inclusive, contain a true copy of all the record, pleas, process, papers, and proceedings in the cause, lately pending in the United States circuit court of appeals for the fifth circuit, of Jacob Sonnentheil, plaintiff in error, *vs.* The Christian Moerlein Brewing Company and J. J. Dickerson, defendants in error, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of January, 1897.

Seal United States Circuit Court of Appeals, Fifth Circuit.

J. M. McKEE,
*Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.*

399 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Jacob Sonnentheil, plaintiff in error, and The Christian Moerlein Brewing Company and J. J. Dickerson, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—

E. D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

400 [Endorsed:] Filed Dec. 29, 1896. J. M. McKee, clerk.

In obedience to the commands of the within writ and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I herewith transmit to the honorable the Supreme Court of the United States, at Washington, a true, full, and perfect transcript of record and proceedings of said United States circuit court of appeals, including the opinion of the court, in the cause mentioned in the within writ.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the fifth circuit, at New Orleans, La., this 9 day of January, 1897.

J. M. McKEE,
*Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.*

401 UNITED STATES OF AMERICA, *ss:*

To the Christian Moerlein Brewing Company and J. J. Dickerson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein Jacob Sonnentheil is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-six.

E. D. WHITE,
*Associate Justice of the Supreme Court of the United States.*

402 On this 4th day of January, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared E. T. Dorough, deputy U. S. marshal, before me, the subscriber, C. Dart, clerk U. S. circuit court, E. D. T., and makes oath that he delivered a true copy of the within citation to F. Charles Hume, at Galveston, Texas, a member of the firm of Hume & Kleberg, and attorney of record for the defendants, The Christian Moerlein Brewing Co. and J. J. Dickerson.

E. T. DOROUGH,
*Dep'ty U. S. Marshal.*

Sworn to and subscribed the 4th day of January, A. D. 1897.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
*Clerk U. S. Circuit Court, E. D. T.,*
By GEO. H. BURNETT, *Deputy.*

Endorsed on cover: Case No. 16,466. U. S. circuit court of appeals, 5th circuit. Term No., 286. Jacob Sonnentheil, plaintiff in error, *vs.* The Christian Moerlein Brewing Company and J. J. Dickerson. Filed January 14, 1897.

No. 286. 45.

Brief of Willie for P. E. Con mo

FILED
NOV 29 1897
JAMES H. McKENNEY
CLERK

Filed Nov. 29, 1897.

No. 286.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

*v.*

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

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ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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ANSWER OF PLAINTIFF IN ERROR TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

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A. H. WILLIE,
Counsel for Plaintiff in Error.

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HATCH, DELANO & CO., PRINTERS, GALV.

No. 286.

# In the Supreme Court of the United States.

October Term, 1897.

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JACOB SONNENTHEIL, Plaintiff in Error,

*v.*

THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON, Defendants in Error.

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Error to the United States Circuit Court of Appeals for the Fifth Circuit.

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## Answer of Plaintiff in Error to the Motion to Dismiss the Writ of Error.

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*To the Honorable Supreme Court of the United States:*

Answering the motion to dismiss, filed in this cause, plaintiff in error alleges that the jurisdiction of the Circuit Court of the United States for the Eastern District of Texas was invoked in this suit upon two grounds, viz., as to the defendant, the Moerlein Brewing Company, upon the ground that said Company was, when the suit was brought, a citizen of the State of Ohio, and the plaintiff a citizen of the State of Texas; and as to the defendant, Dickerson, upon the ground that the case, as to him, was one arising under the laws of the United States, and hence, the jurisdiction of said court, as invoked, did not depend entirely upon the diverse citizenship of the parties to the suit. (Rec., pp. 2, 62-73.)

## ARGUMENT.

The defendants in error rest their motion to dismiss upon the proposition that "the judgment of the Circuit Court of Appeals is final, unless as to *all* parties there is jurisdiction upon a ground *other than* (though as to some it may be *additional to*) that of diverse citizenship."

This is an attempt to make the statute under which this writ was sued out, instead of reading that the judgments of the Circuit Court of Appeals shall be final "in all cases where the jurisdiction is dependent *entirely* upon the opposite parties being citizens of differents," read "where the jurisdiction is dependent either entirely, *or partly*, upon the opposite parties being citizens of different states." This changes the whole meaning of the statute, giving it a sense exactly opposite to that which its language conveys.

The statute, of course, refers to the jurisdiction of the United States Court in which the suit was filed, and to its jurisdiction of the whole case as presented in the complaint, and not to its jurisdiction as to any one or more parties to the cause. The court may have jurisdiction as to one defendant for one reason, and as to a different defendant, for another reason, but it requires both defendants to make up the case, and both grounds to give the court cognizance of the cause, as it is brought, and the jurisdiction of the case cannot, therefore, be said to depend entirely upon the particular ground upon which it is invoked as to either of the defendants. In the present case the defendant, Dickerson, was a citizen of the same state as the plaintiff. Jurisdiction as to him could not be claimed by reason of diverse citizenship, yet it was necessary that the court should have jurisdiction as to him or it could not take cognizance of the case. But for the fact that Dickerson was sued for an act done by him as United States marshal, the court would have dismissed the cause for want of jurisdiction, for it would have depended only in part, and not entirely on diverse citizenship, and as to the remaining defendant, there would have been no jurisdiction whatever.

The statute contemplates that there may be cases in which the jurisdiction will depend partly upon diverse citizenship and partly upon some other ground. If it had intended that this should be the state of the case as to each defendant, it would have said so, and not have been content with language that brings a suit like the present precisely within its terms.

The case cited, of Colorado Mining Company vs. Turck, 150 U. S.. 138, is no authority for the contention of defendants in error.

The only point decided in that case is that the fact that the jurisdiction of the suit does not depend entirely upon diverse citizenship, must appear when such jurisdiction is invoked, and if it is not thus invoked, it is not sufficient that another ground of jurisdiction is subsequently developed in the course of the proceedings.

Such, too, is the ruling in the cases of Rouse vs. Letcher, 156 U. S., 57; U. S. vs. Am. Bell Tel. Co., 159 U. S., 548; Borgmeyer vs. Idler, 159 U. S., 408; ex parte Jones, 164 U. S., 691.

In the present case the jurisdiction was invoked in the complaint itself upon two grounds, one of which was not diverse citizenship; and the case comes up to all the requirements of the foregoing cases, and its jurisdiction did not depend entirely upon diverse citizenship.

It is no answer to this to say that but for the fact that the Moerlein Brewing Company was a citizen of a state different from that of the plaintiff there would have been no jurisdiction against both defendants; for it is equally true that if the case against Dickerson had not depended upon an act committed by him as United States marshal, the court could not have taken cognizance of the suit; hence, the jurisdiction is as much dependent upon the case's arising under the laws of the United States as upon diverse citizenship.

It may be further remarked, that the provisions of the act of March 3, 1891, apply as much to one party to the cause as to the other, and if a plaintiff, who sues a United States marshal for a trespass committed by him in his official capacity, can not appeal to this court from a decision of the Circuit Court of Appeals, the

marshal can not do so if the judgment should be against him. This being the case it is in the power of the plaintiff ~~to~~ an action to deprive the marshal of his right to have his case adjudicated in this court by simply joining with him another defendant who is a citizen of another state, and against whom there is a like cause of action.

This would not be in accord with the general course of decisions which give to the officers of the general government the right to resort to its courts for an adjudication of suits against them growing out of their official conduct.

It is respectfully asked that the motion to dismiss be overruled.

A. H. Willis

Counsel for Plaintiff in Error.

No. 286. 45.

MAR 5 1898
JAMES H. McKENNEY,
CLERK.

Brief of Willie for P. E.
Filed Mar. 5, 1898.

# Supreme Court of the United States

OCTOBER TERM, 1897.

No. 286.

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JACOB SONNENTHEIL, PLAINTIFF IN ERROR.

*vs.*

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANT IN ERROR.

---

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF FOR PLAINTIFF IN ERROR.

BY A. H. WILLIE,
COUNSEL.

HINTON, ROLAND & CO., PRINTERS, GALV.

# Supreme Court of the United States

OCTOBER TERM, 1897.

No. 286.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR.

*vs.*

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

## STATEMENT OF THE CASE.

On December 16, 1892, Freiberg, Klein & Co., a firm then doing business in Galveston, Texas, as wholesale dealers in liquors, cigars, etc., conveyed by deed of trust to plaintiff Sonnentheil their entire stock of goods, together with other property, and the debts due them, authorizing him to take immediate possession thereof and to sell the property and collect the debts, and apply the proceeds to the payment of cer-

tain creditors named in the deed of trust. This deed was filed as a chattel mortgage with the County Clerk of Galveston County, Texas, on the day it was executed, and plaintiff in error, as trustee, took immediate possession of the property therein conveyed.

Another deed of trust, dated December 17, 1892, was executed by the same parties to the same trustee to secure the same debts, differing from the first deed only in inserting some words which had been erased from the first deed, and in giving the trustee the power to compromise or sell the debts due the firm, and in binding the grantors and each of them, in the name of the firm, to make such further assurances, etc., as to the property conveyed as would speed the execution of the trust. This last deed was not recorded.

Sonnentheil was holding the property in question under both these deeds, when, on December 23, 1892, the United States deputy marshal seized and took it from his possession against his protest. This seizure and dispossession was made by virtue of a writ of attachment from the said Circuit Court in a suit for debt by the said Moerlein Brewing Company vs. Freiberg, Klein & Co., and the seizure was directed by the agent of the company. The Brewing Company was not secured in the deeds of trust. This suit was brought by Sonnentheil, the trustee, against the United States marshal and the Moerlein Brewing Company to recover the value of the goods thus seized and taken from him.

The defendants demurred to the jurisdiction of the Court, pleaded a general denial and attacked the deeds of trust as void on the face, and as not having been accepted by the trustee or preferred creditors, and as having been made with intent to defraud the unpreferred creditors of the makers, of

which fraud they alleged the trustee and preferred creditors had knowledge.

The specific objections urged to the deeds are that a provision allowing the trustee to compound and compromise doubtful debts due the makers was erased from the first deed before filing, and this provision and one authorizing each of the makers to make further assurances of title and transfer with the same effect as if made by each in person. That the makers of the first deed had a short time prior to its execution represented to two commercial agencies that they were solvent, and had thereby deceived the defendant company into selling them a large amount of goods on credit; that the deeds conveyed property exceeding in value the debts secured; that the claims provided for in the deeds were also secured by solvent indorsers. That the makers had, not long before the execution of the first deed, conveyed to L. Fellman a large amount of real estate for a feigned consideration and in secret trust for themselves, and for the purpose of removing the same from the reach of their creditors, and had conveyed to others a large amount of assets to hold for their benefit. That they had made to H. Kempner a deed of trust to secure a pretended debt. That the makers of the deeds had, long prior to their execution, and whilst insolvent, entered into a conspiracy with L. Fellman, who was indorser on a large amount of Freiberg, Klein & Co.'s paper, and with other persons, to remove the then present embarrassments of the firm and to continue business, and then, after enlarging their stock by purchases to a sufficient amount, to fail and secure Fellman and other home creditors, and that the deeds of trust were the result of this conspiracy.

The plaintiff replied, denying the allegations of the answer and alleging acceptance of the deed of trust before levy of

the attachment. Upon the trial it was shown that the deeds of trust under which Sonnentheil claimed were duly executed, that the first was duly filed for record, and that Sonnentheil was in possession of the property as trustee at the time the second deed was executed. That the debts preferred in the deeds amounted to about $140,000, all of which, except $10,000, were secured by the accommodation indorsement of Fellman & Grumbach, and none was secured otherwise. That several of the creditors had accepted the deed of trust before the levy of the attachment, and some of the secured debts were paid thereafter.

There was evidence tending to show that Freiberg, Klein & Co. were insolvent at times during the two years that preceded their failure. That several meetings between these parties—Fellman, Grumbach, Kempner and other parties—occurred, at which the question of their solvency, and how to protect them from failure, was discussed, and arrangements were made to reduce their debts, so as to render them solvent, so that they could continue business. After these meetings the firm continued business as before, buying and selling goods for cash and on credit. That at these several meetings it was determined that the firm should endeavor to make money by their business, but if they had to fail Fellman should be protected. There was also evidence to the effect that a short time prior to the failure Fellman promised to buy out their goods and let them carry on business in his name. The evidence also tended to show that before making the deeds a conveyance of lands for something less than their value was made by the firm to Fellman for cash, paid by him. Also, that Seinsheimer, one of said firm, had kept for awhile from the trustee some of the bills receivable of the firm, but

that the trustee upon finding this out had made him turn these bills over to him.

Other minor matters, occurring since the deeds of trust took effect, were admitted in evidence, such as correspondence between the trustee and Fellman, showing an effort on the part of the trustee to recover the amount of debts claimed by him to be due from Fellman to Freiberg, Klein & Co., attempted interference by members of the firm with the assets under the charge of the trustee, etc., all of which are fully set out in the assignment of errors and need not be repeated.

It was also shown that Freiberg, Klein & Co. had represented to a commercial agency several times during their insolvency that they were solvent, and thus obtained credit from the defendant company.

It was not shown that the trustee, or the beneficiaries in the deed of trust, had any knowledge of the several fraudulent matters laid to the charge of Freiberg, Klein & Co., and the plaintiff in error, claims that there was no evidence to show that they were in possession of facts to put them upon inquiry as to the same, which inquiry, if properly pursued, would have led to a knowledge of such fraud.

During the trial, the defendant offered evidence to show that subsequent to the deed of trust, and the acceptance of same by the secured creditors and the trustee, Freiberg, Klein & Co. were collecting for their own benefit some of the assets of the firm, and this evidence was admitted by the Court over the plaintiff's objections.

The defendants offered evidence that a debt secured in the deeds of trust had been paid since the deed took effect, which was admitted over plaintiff's objections.

The Court also permitted, over objections, a witness to testify as to statements made by Freiberg, Klein & Co. to

Dun's Agency as to their assets and liabilities not long before their failure.

The Court also admitted in evidence, over objections, a paper showing an untrue statement of the financial condition of the firm made to Dun's Agency just before the failure by one of its members; also a statement, which a witness thought was a copy from the record of Dun's Agency, of the condition of the firm in March, 1891, made by one of its members. This paper, and the one next preceding, showing the firm solvent, when, as the witness thought, they were not.

The Court allowed a witness, over plaintiff's objection, to read to the jury a copy of a report made by Freiberg, Klein & Co. on February 13, 1892, to Dun's Agency, showing the firm solvent at that time, when, in the opinion of the witness, it was not.

The Court allowed a witness to testify, over plaintiff's objections, as to interviews held by him, after the execution of the deed of trust and whilst the trustee was in possession of the goods, with one of the members of the firm, in which the latter made declarations as to the deed and his intentions in the future.

The Court also allowed a witness to testify, over objections, as to transactions between the firm and Fellman and others, which took place prior to the deed of trust, of which neither the trustee nor beneficiaries had knowledge.

The Court admitted, over objections, the testimony of a witness, to the effect that there were rumors afloat in 1892 as to the solvency of Freiberg, Klein & Co., after witness refused to state from whom he heard such rumors, or the particulars of the same. The plaintiff reserved exceptions to all such testimony, which will more fully appear from the assignment of errors.

The Judge charged that the deed was valid on its face. He left to the jury to determine whether the deed was accepted or not by any of the beneficiaries before levy of the attachment, and refused the request of the plaintiff to charge as to what constituted an acceptance. He charged that in order to vitiate the deed for fraudulent intent of the grantors that intent must have been known to the trustee or the beneficiaries of the trust, or they should have been aware before accepting it of facts which put them upon inquiry as to such intent. In the first part of his charge he added, which inquiry would have led to a knowledge that the instrument was fraudulent; but finally the Judge instructed the jury to find for the defendant if the accepting creditors knew of the fraud in the deed or were in possession of information that would put a prudent man upon inquiry as to the fraud, failing to instruct the jury that it must appear that such inquiry would have led to a knowledge of the fraud, and refusing to give a charge to that effect requested by plaintiff. The Judge left the jury to determine as to whether the plaintiff and the secured creditors had notice of the fraud.

The Judge also refused a charge to the effect that the deed had been accepted before the levy, and one stating to the jury what constituted an acceptance of a deed of trust.

He also refused to charge that the fact that a debt secured by a deed of trust was also secured by personal indorsement, would not prevent such deed from being enforced and carried out for the benefit of the secured creditors, and that such creditors would not be affected by any fraud committed by any other creditor, or by the person whom he held as indorser, if he had no notice of said fraud or reasonable cause to suspect it before his acceptance of the deed.

The Court refused a charge asked by the plaintiff excluding from the jury the evidence as to Seinsheimer's misconduct towards his partners, and as to the false statements made to the commercial agency, unless the jury believed from the evidence that notice of these things had been brought home to the beneficiaries in the deed. Also, a charge to the effect that knowledge of insolvency was not sufficient to put upon inquiry as to fraudulent intent.

The Judge also refused a general charge to find for the plaintiff the value of the goods attached at the time and place when and where they were seized by the marshal, together with interest from date at the rate of 6 per cent per annum. The jury found a verdict for the defendants. The case was taken by plaintiff to the Circuit Court of Appeals of the Fifth Circuit, and the judgment of the Court below was there affirmed. The opinion of that court rests the affirmance upon the ground that the only question submitted for its decision was the action of the trial court in refusing the said peremptory charge, and that said charge asked [illegible] findings of fact.

## ASSIGNMENT OF ERRORS.

First—The trial court erred in admitting in evidence over the objection of plaintiff's counsel the following document:

(On the letter-head of Freiberg, Klein & Co.)

January 16th, 1893.

"*Mr. E. Browne:*

"Please accept order of Freiberg, Klein & Co. for $180 on policy, and oblige.

"Respectfully,

"JAMES E. BURKE."

"Profit and loss to cover difference in cash occasioned by amount short in various ways during absence, etc., since February, 1891, $2416.47," which was proved to have been made by Seinsheimer, one of the firm of Freiberg, Klein & Co., on or after December 24th, 1892, and subsequent to the execution, delivery and acceptance of the such deed of trust and its admission in evidence was objected to by plaintiff's counsel for that reason; and, further, because the entry related to cash shortage from February, 1891, to date of entry, and the said deed of trust gave the trustee no interest in the cash whatever, and he had no right to claim from Freiberg, Klein & Co. any cash, and the entry was the mere admission after the fact by a person who may have been interested in keeping a memorandum of a matter with which the plaintiff had nothing to do. The meaning of the entry was shown to be that this amount of cash was short in the mercantile transactions of Freiberg, Klein & Co. since February, 1891, and it had been charged to profit and loss.

Seinsheimer was acting as bookkeeper for plaintiff after he took possession under the deed of trust. During the time he thus acted he also made entries in the books of Freiberg, Klein & Co., which had been turned over by said firm to said trustee. Whilst plaintiff knew that he was making entries in these books, he did not know what such entries were, not having any interest whatever in such entries. He kept a separate set of books, in which were entered all the transactions relating to his trust, and looked into the books of Freiberg Klein & Co. only for the purpose of finding out what belonged to him as trustee, or to get the items of an account when it was to be settled, and for no other purposes.

The plaintiff's objections were overruled, and the evidence admitted subject to being controlled thereafter by the Court.

But the Court neither, by the charge nor otherwise, excluded or in any manner alluded to the evidence thereafter during the trial.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Third—The trial court erred in admitting in evidence the following matters:

1. Entries in the books of Freiberg, Klein & Co., showing a charge of $5000 against L. Fellman, which was one taken from those books and entered into those of the trustee.

2. Correspondence between the trustee and Fellman, which took place in May after the deed of trust was executed, in which the trustee notified Fellman of this charge against him and demanded payment of the amount, and Fellman replied that the $5000 was used by him to pay off a claim held by H. Kempner against Freiberg, Klein & Co., upon which Fellman was surety and which was secured by collaterals of little value, and he did not propose to pay the firm or the trustee anything until all the paper had been satisfied. The trustee was advised by his counsel not to file suit against Fellman, but make him give an account of the securities he held against the claim.

In connection with this entry and correspondence there was read a deed of trust from Freiberg, Klein & Co. to J. J. Eckford, securing Kempner for a debt of $5000 by lien upon property in Dallas, Texas. Two notes of $2500 each, signed by Freiberg, Klein & Co. and Fellman & Grumbach, payable to the order of the makers and indorsed by them, and marked on the back: "Paid by L. Fellman. H. Kempner." One of the notes was due December 30, 1892, and the other December 18, 1892, and both were payable to the order of the makers.

Also, an abstract of a judgment of G. Edloff vs. G. C. &

S. F. Ry. Co. and A. T. & S. F. R. R. Co. for $2462.59, dated April 25, 1893, which judgment was shown to have been one of the collaterals securing the above debt, and to have been transferred by Fellman to the trustee upon the latter paying Fellman the amount advanced by him in the matter of the Eckford collaterals, and said judgment being all that was left of the Eckford security after paying expenses. The trustee took this judgment from Fellman and still had it in his possession. It was shown that Fellman was security for Freiberg, Klein & Co. on a large amount of their indebtedness besides the Kempner claim. The trustee never knew anything of the deed of trust, and there was no evidence that the accepting creditors had any notice of it.

Plaintiff objected to the introduction of each and every portion of the above evidence, because it was irrelevant and referred to matters occurring after the deed of trust to Sonnentheil had taken effect, and could not affect the validity of the same, or the interest of the trustee or the beneficiaries, under the deed of trust, which objections were overruled by the Court.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Fourth—The trial court erred in admitting in evidence over the objection of plaintiff for irrelevancy, and being a matter occurring subsequent to acceptance of the deed of trust, the following letter to H. Kempner to J. J. Eckford, in reference to the Eckford deed of trust:

"Mr. J. J. Eckford, Dallas, Texas—Dear Sir: In the matter of Messrs. Freiberg, Klein & Co., Mr. Jacob Sonnentheil of this city is trustee for all their assets, property and assets, and the property assigned for my benefit in Dallas, all pro-

ceeds of sale should be accounted for and paid to him. Please deliver or pay to the order of Mr. Jacob Sonnentheil, trustee of Messrs. Freiberg, Klein & Co., all matters, money, etc., in your hands, which have been, or will now be, held for my benefit.

"Yours truly, H. KEMPNER."

And the said Circuit Court of Appeals erred in confirming said erroneous ruling of the trial court.

Fifth—The trial court erred in admitting evidence to show that a debt to the Citizens' Loan Company secured in the deed of trust to Sonnentheil had been paid since the deed of trust had taken effect over the objection of plaintiff that such evidence was irrelevant and referred to transactions occurring after the deed was accepted.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Sixth—The trial court erred in allowing the witness Grelling to read to the jury a statement made by him, whilst bookkeeper of Freiberg, Klein & Co., to Dun's Agency of the condition of the firm on September 29, 1892, which statement showed the assets of the firm to be $391,184.74, and their liabilities in notes and accounts $182,561.38; the witness further testifying that this statement was made and handed to him by Seinsheimer, one of the said firm, and was taken by the witness to Dun's Agency by direction of Seinsheimer, and that the statement was not true, as he did not think the firm was solvent at the time; and that the firm went on and bought and sold goods after making this report, buying some from the said Christian Moerlein Brewing Company, and that the firm could not have continued in business if a true report had been made to the agency.

To which evidence plaintiff objected, for the reason that neither the plaintiff nor any of the beneficiaries in the deed of trust had been connected with any such representations, and said trustee and beneficiaries had no knowledge of the same at or before the time when their rights vested under the deed of trust made to Sonnentheil by Freiberg, Klein & Co., but the Court admitted the evidence.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Seventh—The trial court erred in allowing the witness Grelling to read to the jury a paper which he said he judged was a copy from the record of Dun's Agency report made to said Dun's Agency on March 14th, 1891, by Freiberg, Klein & Co., showing the assets of the firm to exceed its liabilities, $209,157.09, the witness stating that the report was false, and the firm at that time, in his opinion, insolvent.

Plaintiff objected to the reading of this report, for the reason that neither the plaintiff nor any of the beneficiaries under the deed of trust had been connected with any such representations, and no one of them had any knowledge or notice of the same when the deed of trust was accepted.

And for the further reason that the paper offered was a mere copy, which, in the judgment of the witness, was taken from the books of Dun's Agency, and the books were better evidence. But the Court overruled the objections and admitted the evidence.

Eighth—The trail court erred in allowing the witness Grelling to read to the jury a like copy of report made by Freiberg, Klein & Co. to Dun's Agency on February 13th, 1892, from which it appeared that the assets of said firm exceeded its liabilities $200,987.42, whereas in the opinion of the witness it was insolvent.

Plaintiff's counsel objected to the reading of this report because it was not shown that either the trustee or any of the beneficiaries had any notice of the same when the deed of trust was accepted, and also because the paper purported to be a copy from the books of Dun & Co., which were better evidence. But the court overruled the objection and admitted the statement.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Ninth—The trial court erred in admitting in evidence the statements of Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deed of trust, in which Freiberg is said to have asked him, Werner, as agent of the Moerlein Brewing Co., to give him, Freiberg, the agency for the sale of beer, and saying that after they got a settlement they would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that they had to fail, which evidence was objected to on the ground that it was hearsay and *res inter alios acta*. It related to facts which occurred after the deed of trust was made, and not shown to have been known or assented to by the trustee or beneficiaries of the deed of trust, and was incompetent to affect their interests. But the court overruled the objection and admitted the evidence.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Tenth—The trial court erred in allowing Moses Freiberg, one of the firm of Freiberg, Klein & Co., and a witness in behalf of the defendant, to testify over the objections of plaintiff, in substance, as follows: -

The firm of Freiberg, Klein & Co. were embarrassed in February, 1891, and had to scale a large amount of its indebtedness by paying a portion of the same out of the private means of the partners and obtaining a remission of a portion of the remainder; that this put them ahead financially and enabled them to continue business; that within two months afterward they were again unable to meet their obligations and held a conference with Fellman & Grumbach, who were their endorsers to the extent of about $135,000.00, and with Harris Kempner, another endorser, at which Fellman stated that he was endorser also on a large amount of other paper, and if the firm failed then, he would break; and it was agreed that it should continue business and try to pull through, but if it failed, Fellman was to be protected at all hazards by a bill of sale to him of its stock and business whenever the members found that they could no longer meet their obligations. Fellman expected a large amount of the firm's paper to be retired, and therefore insisted on it continuing in business. The firm was then solvent, but embarrassed. They continued buying and selling as usual, and in February, 1892, found their business in bad shape. It was perilous to their creditors to continue business, and it would take extraordinary good fortune to pull through. Rumors as to their failing condition impaired their credit in the spring and summer of 1892. They bought on credit when they could and paid cash when they could not, and continued to do thus down to within a few days of their failure.

In December, 1892, when they found they could no longer continue business, they telegraphed to Fellman to come home, their object being to raise the money through him to meet their debts or to sell out to him as agreed on.

He came to Galveston, and in conversation with the witness a few days before the failure, told the latter that after he had bought them out, the witness might run the business in Fellman's name till he could settle with his creditors, and Fellman would see that he got money enough for that purpose. The original agreement was to dispose of the stock by bill of sale, but at the last moment it was changed to a deed of trust, which Fellman preferred. Seinsheimer was brother-in-law to Kempner and Grumbach and son-in-law to Fellman.

After the attachments were levied, witness requested Fellman to replevy the stock or buy it out as promised, but he refused, as also to put up $25,000 to enable the firm to settle with their creditors.

Witness also testified that the second deed of trust was made on the Sunday following the execution of the first deed; that previous to making the first deed of trust the firm made a deed of conveyance of real estate direct to Fellman for $10,000 cash, and he considered the property thereby conveyed to be worth twelve or fiteen thousand dollars, and the deed was made in anticipation of the bill of sale or deed of trust. He considered the property transferred to Sonnentheil in the deed of trust worth $225,000.00 or $75,000.00 more than the debts secured.

That $20,000 of the notes transferred were withheld from the list by Seinsheimer, but upon demand of the trustee were turned over to him.

As to the Eckford deed of trust in favor of Kempner, he stated that he did not know that the firm owed Kempner anything, but supposed the deed was to secure an indebtedness to Fellman.

To the admission of which testimony the plaintiff objected, because it was not shown by the evidence that either the beneficiaries in the deed of trust or the trustee Sonnentheil, at or

before the execution of said deed and the acquisition of their rights thereunder, had any knowledge, or were chargeable with notice, of the matters testified to by the witness; and as the witness had answered upon cross-examination that neither the trustee nor any of the creditors secured in the deed of trust knew of any of the conversations or transactions he had testified to as occurring prior to or at the time of the making of the deed of trust, between the firm of Freiberg, Klein & Co., or any of its members and Fellman, or Fellman & Grumbach, the testimony so far as such conversations and transactions were concerned was further objected to because of such want of knowledge or notice on the part of said trustee or beneficiaries, but the Court overruled both of said objections.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Eleventh—The trial court erred in allowing the defendants to read as evidence to the jury over the objections of plaintiff's counsel the statements made in the depositions of E. H. Gorse, a witness for defendants, in answer to direct interrogatories propounded to him by defendants, which evidence was substantially as follows:

That in 1891 and 1892 witness was manager for R. G. Dun & Co.'s Commercial Agency, and that Grelling, the bookkeeper for the firm of Freiberg, Klein & Co., on February 13, 1892, made a statement to said agency showing the assets of the firm to be $407,828.26, and their liabilities $206,840.84, and that they made another statement September 29, 1892, showing their assets to be $391,184.74, and their liabilities $182,561.38. L. A. Grelling made the statements at the instance of Seinsheimer. Large firms made statements once a year, but this additional statement was required of Freiberg, Klein & Co., because it was rumored they were shaky and

their credit suffering. The foregoing statements are copies from the books of Dun's Commercial Agency in the office of the agency. Their financial condition was inquired about by merchants in the north and east, and rumors as to the same were discussed among brokers, bankers and merchants. This made him desire to post himself further as to their foundation, and he inquired generally with somewhat unsuccessful results, as Grelling and Seinsheimer misrepresented the condition of the firm, and bankers were not willing to tell the truth about the firm's affairs as far as related to the banks. These rumors were of sufficient importance to suggest a rigid examination by interested parties.

Witness also attached a statement of the assets and liabilities of Freiberg, Klein & Co., dated March 14, 1891, which he said was a copy of a statement made by Grelling to the agency, at the instance of Seinsheimer, on February 1, 1891. Being asked on cross-examination to state through whom he heard the rumors about Freiberg, Klein & Co.'s condition about September, 1892, he declined to answer, saying that to do so would be breach of faith. He also stated that it was his duty to investigate such rumors and to know and note their sources, basis and origin.

The objections to the answers of the witness to direct interrogatories were:

To so much as related to statements made by Freiberg, Klein & Co. to Dun's Agency, because, first, the matters testified to were not shown to have been known to either Sonnentheil, the trustee, or the beneficiaries under the deed of trust of December 16, 1892, at or before the acquisition of the rights of said beneficiaries under said deed. Second, because the testimony related to and embraced copies of original documents not shown to have been lost and not produced or other-

wise accounted for, and which were better evidence than the copies.

To so much of said evidence as referred to rumors and the sufficiency of said rumors to induce critical investigation by parties interested, because:

First—The testimony was as to the conclusions of witness, and not facts upon which the jury could form its conclusions as to the sufficiency of said rumors.

Second—Because the witness on cross-examination refused to give the particulars of such rumors, so as to enable the jury to form their conclusions thereupon.

And as to all said depositions, so far as they related to rumors about Freiberg, Klein & Co.'s standing and ability, because the witness, when cross-examined, particularly as to said rumors, and his source of information refused to answer in respect thereof, or to give the particular facts. The defendants, in answer to said objections, put in evidence the original report of the said agency of September 29, 1892, which corresponded with the copy testified to by the witness.

Whereupon the Court overruled plaintiff's objections, and allowed said testimony to be read to the jury.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Twelfth—The trial court erred in refusing to give the following instruction asked by plaintiff's counsel:

"The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, the bona fide debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company,

and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said Brewing Company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed, and converted them to the use of said Brewing Company. You are therefore instructed to find a verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of 6 per cent per annum from the date or such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

It having been shown by the uncontradicted evidence that the deed of trust under which the plaintiff claimed title in this case to the goods seized by the defendant, J. J. Dickerson, under an attachment sued out by his co-defendant, the Christian Moerlein Brewing Company, and to recover damages for which this suit was brought, was a valid instrument on its face, and so held by the Judge before whom the cause was tried; that all the debts secured thereby were the bona fide debts of Freiberg, Klein & Co.; that several of the creditors secured by said deed had accepted the same before the levy of

the attachment of the Christian Moerlein Brewing Company, among others A. W. Fly, S. A. Walker, Adoue & Lobit, the First National Bank of Galveston, the Island City Savings Bank and the Citizens' Loan Company; and there was no evidence whatever that either of said parties knew of such intent of Freiberg, Klein & Co. in making said deed, or knew of any fact calculated to put them upon inquiry as to any fraudulent intent in making said deed, but the positive testimony being directly to the contrary, the defendants' witness, Freiberg, having testified that neither of said beneficiaries knew anything of the circumstances detailed in his testimony, which were relied on by defendants to show fraud in the deed, and the utmost extent of the facts brought to their knowledge being rumors that the firm was insolvent, and any inquiries prosecuted by them would have led up to no fact as to the deed of trust other than appeared upon its face, and that the makers of it were insolvent when it was executed.

It was also proved that the United States marshal, the defendant Dickerson, under an attachment sued out by the Moerlein Brewing Company, his co-defendant, had, by direction of said company, seized the goods in question in this case, and taken them from plaintiff Sonnentheil, who held them at the time as trustee for the creditors named in said deed, and had converted them to the use of said company.

It had been further shown what the goods thus seized would have been sold for at wholesale at the city of Galveston, the place of seizure, at the time of seizure, and the defendant had introduced evidence for the purpose of showing their cost price in distant markets and the cost of their transportation; as also what they actually brought when sold at public auction. The whole evidence required a verdict for the plaintiff,

and the Court should have left nothing to the jury except the amount of damages to be recovered.

And the Circuit Court of Appeals erred in sanctioning and affirming the refusal of said trial court to give the above recited charge.

Thirteenth—After refusing to give the foregoing, the Court erred in refusing to give the following special instruction asked by plaintiff's counsel, numbered 5th. Special Instruction:

"On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts as would have caused a reasonably prudent man to have inquired into such intent, and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them upon inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent, then they would not be chargeable with notice of such intent, unless they had knowledge of it."

The evidence having established the acceptance of the deed of trust by several of the preferred creditors prior to the levy of the attachment, and evidence having been admitted over the objection of plaintiff's counsel, to the effect that there were rumors in Galveston, prior to the failure of Freiberg, Klein & Co., as to the insolvency of said firm, which rumors may have been heard by the said creditors, and the court below having failed to instruct the jury as to the effect of a knowledge on the part of such creditors of the insolvency of

said firm, acquired by them before acceptance of the deed of trust, plaintiff's counsel asked the above instruction to the jury, which was refused.

And the said Circuit Court of Appeals erred in affirming the said erroneous ruling of the trial court.

Fourteenth—The trial court erred in refusing to give the sixth special instruction asked by plaintiff's counsel, which is as follows:

"On the question of acceptance, I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word *accept* in accepting the deed of trust. A creditor who communicated to the trustee, or to Freiberg, Klein & Co., his willingness to accept the security and benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents, and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City Savings Bank, the Citizens' Loan Company and the First National Bank, and he had authority from them, either express or implied, to do so, the said corporations accepted. In considering his authority, you will consider the offices he held, his previous conduct of the said offices, and the sanction, if any, accorded by the said corporations to his acts of similar nature, and to his acceptance, if any, in this matter."

It was proved that M. Lasker accepted the deed of trust, claiming to be the agent of the following creditors secured thereby. The First National Bank of Galveston, the Island City Savings Bank and the Citizens' Loan Company. It was proved that at the time he was vice-president and chairman of the committee of finance of the first-named bank and a member of the finance committee of the two other corpora-

tions; that he had charge of the financial matters of the bank, especially those pertaining to loans and securities, and that his action in reference to all such matters had never been repudiated by either of the corporations for whom he acted, but always approved, and the charter and by-laws of said corporations showed that there was no provision in any of them prohibiting it from allowing such agent from accepting a deed of trust for the bank's benefit, or conferring special authority upon any other agent to perform this service.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Fifteenth—The trial court erred in refusing to give to the jury the following instruction asked by plaintiff's counsel, numbered 6a, which is as follows:

"6a. The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument."

The defendants had introduced testimony to show that, after the acceptance of the deed by several of the beneficiaries therein, some of the members of the firm of Freiberg, Klein & Co. had attempted to get possession of some of the assets of the firm for their own benefit and had made improper entries in the books of that firm, without the consent of any of such beneficiaries, and the Court in its general charge had failed to instruct the jury that such conduct, if fraudulent, could not

affect the validity of the deed as to such accepting creditors, which evidence the Court had admitted over the objection of plaintiff's counsel.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Sixteenth—The Court erred in refusing to give to the jury the seventh special instruction asked by plaintiff's counsel, which is as follows:

"7. The fact that a debt secured by a deed of trust is also secured by personal endorsement does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as an endorser upon his claim when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman, or Fellman & Grumbach may have been guilty of fraud, must not affect your verdict; if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's endorsement. The fact that Fellman, or Fellman & Grumbach, may have, subsequent to the attachment, paid off some of the claims secured by their endorsement, must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman, or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account

of the claims they have paid, that is a matter that can not be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose."

The defendants had introduced testimony tending to show that Fellman, who was one of the endorsers upon some of the claims secured in the deed of trust, had participated in some of the frauds alleged to have entered into the making of the deed of trust, and that as to the claims on which he was endorser, and that the deed was intended to secure him, and the evidence failing to show any knowledge on the part of any of the beneficiaries in the deed, whether those who held claims upon which Fellman was endorser or those upon which there was no endorsement, of any fraud whatever in said deed, or of any facts sufficient to put them upon inquiry as to such frauds or any other, and the court having failed in its main charge to instruct the jury upon the point covered by this instruction.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Seventeenth—The trial court erred in refusing to give to the jury the eighth special charge asked by plaintiff, which is as follows:

"8. I have necessarily admitted evidence which, at the time it was offered, I could not foresee the relevancy of. Such, for example, as the testimony relating to Seinsheimer's misconduct towards his partners, and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff."

The court had admitted over the objections of plaintiff evidence to show that Seinsheimer, one of the firm of Freiberg, Klein & Co., had, before the execution of the deed, made false representations to a commercial agency to the effect that Freiberg, Klein & Co. were solvent, when, in fact, it was insolvent, and thus obtained credit for merchandise when it would otherwise have been refused, and the evidence failed to show that either of the beneficiaries named in the deed of trust knew of such false representations, or were put upon inquiry of the same; and it had admitted other evidence tending to show an intermeddling of a member of the firm with the assets of the firm to prevent their coming into the hands of the assignee, without showing any connection of either the assignee or any of the beneficiaries of the deed, or any knowledge or notice on their part of such transactions before the acceptance of the deed of trust.

And the witness, Freiberg, had also been allowed to testify that during the active existence of the firm of Freiberg, Klein & Co., Seinsheimer, one of its members, had abstracted and appropriated funds of the firm to his own use, and concealed the facts by false entries and figures in the books of the firm.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Eighteenth—The trial court erred in giving the following clauses of its general charge to the jury:

"* * * you are instructed that in this case, if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment—which, bear in mind, was the 23d December, 1892—and you further believe from the evidence that any creditor named in that instrument had accepted the benefits of this deed of trust prior to the 23d day of December, or on that date—prior to the levy of the attachment,

and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from the testimony that any creditor had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff * * *"

"* * * if you don't believe these creditors accepted, or any of them, before the attachment was levied, you will return a general verdict for the defendant, but if you find some of the creditors, or any of them, did, or any of them before the attachment, then you are to inquire into the question whether fraud existed or not * * *"

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiff for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent per annum from that date until now.

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston —two living at a distance and some of them represented here in Galveston—and you have the right to look to the relations of the parties, and all the circumstances surrounding them, in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors,

if there were any, knew of it or of the facts that would have put a reasonably prudent person on inquiry."

Because in and by means of said clauses the Court left the jury to determine whether or not any of the beneficiaries in said deed of trust had accepted the same before the levy of the attachment of the Moerlein Brewing Company; whereas the question of acceptance *vel non* was a question of law to be determined by the Court, but if a question of fact positive and uncontradicted evidence in the cause fully established the acceptance of said deed of trust prior to the levy of said attachment by the trustee plaintiff in this cause, and thereafter formal and affirmative acceptance thereof by the beneficiaries in said deed of trust was unnecessary to give effect thereto, and moreover said positive and uncontradicted evidence fully established the acceptance of said deed of trust prior to said levy of said attachment by A. W. Fly, S. A. Walker, Adoue & Lobit, the Citizens' Loan Company, the First National Bank of Galveston, and the Island City Savings Bank, and by each of them, and all of said parties, were shown to be the holders at the date of said deed and acceptance of bona fide debts against the makers of said deed, which were secured by the same, and the plaintiff in the charges set forth in the twelfth assignment of error had asked for a charge removing the question of acceptance from the jury, which charge had been refused by the Court.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Nineteenth—The trial court erred in giving the following clause in its general charge to the jury, viz.:

"If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you then you are to extend your in-

vestigation, and if a fraud (if you find it was fraudulent) you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent or whether they had information that would have led to the detection of the fraud that would have put a reasonably prudent person upon inquiry, and upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of the jury; that is what you are here for; the disputed questions of fact; you are the judges of the weight of the evidence and the credibility of the witnesses, and thus being the judges you are to determine who has told the truth and who has not; and, in doing that, you have the right to take into consideration the interest of the parties; you have a right to take into consideration the manner of the witnesses on the stand; in fact you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there, but do what you think is right and just under the law; you must regard the law as your guide; we all bow to it, whatever the law may be, otherwise there would be no law."

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a

reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent per annum from that date until now."

"On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said accepting creditors knew of said fraud, in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry, in that event you will return a verdict for the defendants."

"What I mean is this: If you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment, and that such creditor was not guilty of fraud himself, and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff; but, on the other hand, if you find that the creditor, or creditors, had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant."

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston—two living at a distance and some of them represented here in Galveston—and you have the right to look to the relations of the parties, and all the circumstances surrounding them, in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accept-

ing creditors, if there were any, knew of it, or of facts that would have put a reasonably prudent person on inquiry."

Because the said clauses of the charge left to the determination of the jury the fact as to whether or not any of the beneficiaries in said deed of trust had knowledge of the fraudulent intent, if any there was, in the making of the same, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of such fraudulent intent, if it existed, or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence; but, on the contrary, the uncontradicted evidence was that they had no knowledge when they accepted such deed of such fraud, if any there was, or of any fact that would have put them upon inquiry in reference to the same, and the plaintiff had asked of the Court, as shown in the twelfth assignment of error, a charge to the effect that there was no such evidence in the case.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Twentieth—The verdict of the jury and the judgment rendered in the cause were unsupported by the evidence produced at the trial, and said verdict and judgment should have been in favor of the plaintiff instead of the defendants. The following facts, as appears by the bills of exceptions approved by the trial Judge, were established in evidence:

1. That the plaintiff, Sonnentheil, was, on the 23d of December, 1892, in possession of the property, to recover the value of which this suit was brought, holding it under a valid deed of trust, executed to him as trustee by the firm of Freiberg, Klein & Co., to secure the payment of certain bona fide debts due to creditors named in said deed.

2. That several of said secured creditors had duly accepted said deed of trust before that date.

3. That after such acceptance, and whilst plaintiff was in possession of said property under the deed, it was seized and taken out of his possession by the defendant, J. J. Dickerson, as United States marshal, and under and by virtue of a writ attachment sued out in the Circuit Court of the United States for the Eastern District of Texas by the defendant, the Christian Moerlein Brewing Company, said seizure and disposition being directed by said company, the plaintiff in attachment claiming that said property belonged to said Freiberg, Klein & Co.

4. That Fellman & Grumbach were endorsers upon some of the debts secured in the deed of trust, but some of said debts were not endorsed by them, or any one else, or secured in any way except by said deed of trust.

5. Even conceding that there was proof tending to show that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay or defraud the creditors not secured in the deed, and that Fellman participated therein, it was proven positively that none of the beneficiaries in said deed, before acceptance of the same, knew of any such fraud, and there was no evidence whatever tending to show that before accepting said deed of trust, either those who held Fellman & Grumbach's endorsement on their paper, or those who did not, knew of any fraud in the making of said deed, or of any facts which would put them upon inquiry as to fraud in the same, or that any inquiries they could have made would have led up to a knowledge of any fraudulent intent with which said deed was executed.

6. The value of the goods at the time and place of their seizure by the marshal was proven.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

"Twenty-first—Said Circuit Court of Appeals further erred in holding that the only question submitted to it for decision on appeal was as to the action of the trial court in refusing the charge hereinbefore set forth in the twelfth assignment of error, whereas the correctness of the rulings of the trial court on the several matters of evidence aforesaid, and the several charges refused and given by that court, were made the subject of the assignment of error and the brief of counsel submitted to that court.

Twenty-second—Said Circuit Court of Appeals further erred in holding that the charge made the subject of the foregoing twelfth assignment of error asked the Court to make five or any other number of special findings of fact, when it merely asked the Court to instruct the jury to find a verdict for the plaintiff upon the uncontroverted evidence.

Twenty-third—The Circuit Court of Appeals erred in not reversing the judgment rendered for defendants by the trial court and remanding said cause to said court for a new trial.

For all and each of said errors, plaintiff in error prays that the judgments of the Circuit Court of the Eastern District of Texas and of the Circuit Court of Appeals of the Fifth Circuit be reversed and the cause remanded for a new trial in said trial court.

## POINT 1.

The deed of trust from Freiberg, Klein & Co. to Sonnentheil was duly accepted by several of the creditors secured thereby previous to the levy of the writ of attachment sued out by the Moerlein Brewing Company, and there was no evi-

The questions in this case arise upon the charges given and refused by the court below, and upon the rulings of that court upon the admissibility of evidence. These questions are as follows:

1. Was the deed of trust in question in this cause accepted by any of the preferred creditors before the levy of the attachment?

2. If this fact was proven by uncontradicted evidence, was it not error in the Court to leave it to the determination of the jury?

3. Was not the Court in error in its charge as to acceptance by a corporation, and in refusing a charge on that question as asked by the plaintiff?

4. Was the deed made in fraud of creditors, and if so, were the accepting *bona fide* creditors tainted with this fraud?

5. If any one of such *bona fide* accepting creditors was not thus tainted, and this was shown by uncontradicted evidence, was it not error in the Court to leave the question of this creditor's fraud to the jury?

6. The deed of trust being valid on its face, and all the debts secured therein being *bona fide*, and several of the secured creditors having accepted the deed without participation in the fraud or knowledge of it, and the law as to the damages in the case being well settled and undisputed, should not the trial Judge have charged the jury to find for the plaintiff, leaving to the jury only the question as to the amount of damages to be assessed by them?

7. Should not the trial Judge have charged as requested by plaintiff, that if the holder of a *bona fide* claim secured in the deed had no notice of any fraudulent intent in the making

of it he would not be affected by any knowledge of such fraud on the part of the ~~evidence~~ other creditors

8. Was it not error in the Court to admit the testimony of a witness as to rumors he had heard when he refused, on cross-examination, to state the source of his information?

9. Was it not error in the Court to admit the declaration of one of the grantors of the deed of trust in disparagement of the rights of the secured creditors; these declarations having been made after the trustee had taken possession?

10. Was it not the duty of the Court to direct a verdict for the plaintiff under the evidence adduced in the case?

## BRIEF OF ARGUMENT.

The questions in this cause must be determined by the law and decisions of Texas when these decisions are applicable.

Baumbarger vs. Schoolfield, 160 U. S., 147.

White vs. Cotzhausen, 129 U. S., 329.

Under the decisions of that State the instruments in question here are deeds of trust; the property being conveyed to the trustee to be sold by him, and the proceeds, after paying expenses, to be appropriated to the payment of the debts enumerated in the deeds, and any surplus remaining to be turned over to the makers of the instrument. (Rec., pp. 119-127.)

## AUTHORITIES.

Scott vs. McDaniel, 67 Tex., 315.

Jackson vs. Harby, 65 Tex., 710.

Milling Co. vs. Eaton, 86 Tex., 401.

Waterman vs. Silberberg, 67 Tex., 100.

Tittle vs. Van Lear, 34 S. W. R., 715.

Stiles vs. Hill, 62 Tex., 429.

Hudson vs. Eisenmayer Milling Co., 79 Tex., 401.

Igleheart vs. Willis, 58 Tex., 306.

That an insolvent debtor may prefer one or more creditors to the exclusion of all others by the execution of such an instrument, is well settled by the Texas decisions:

Jackson vs. Harby, 65 Tex., 710.

Waterman vs. Silberberg, 67 Tex., 100.

Scott vs. McDaniel, 67 Tex., 315.

Howell vs. Mars, 82 Tex., 493.

Willis vs. Thompson. 85 Tex., 301.

Haas vs. Kraus, 86 Tex., 301.

Tittle vs. Van Lear, 29 S. W. Rep., 1067.

Rock Island Plow Co. vs. Hill, 32 S. W, Rep., 242.

Such a preference may also be made by a direct conveyance of property to the preferred creditor:

Ellis vs. Valentine, 65 Tex., 332.

Lewy vs. Fischl, 65 Tex., 311.

Allen vs. Carpenter, 66 Tex., 138.

Owens vs. Clark, 78 Tex., 547.

Sanger vs. Colbert, 84 Tex., 668.

Smith vs. Whitfield, 67 Tex., 124.

But in a direct conveyance it is required that the value of the property shall be reasonably proportioned to the debts to be paid, or that such provision be made as to the surplus that it be not placed beyond the reach of other creditors for the benefit of the grantor.

See authorities just cited and Hamburg vs. Wood, 66 Tex., 614, and Black vs. Vaughan, 70 Tex., 47.

But when preference is given in a deed of trust it is not required that the property mortgaged shall be reasonably pro-

portioned to the amount of debts secured, our courts holding that in such instruments the excess is still subject to legal process. "It is," says the Court, "not placed beyond the reach of creditors, and hence they are not defrauded."

Simmons Hardware Co. vs. Kaufman, 77 Tex., 131.

As a result from the above rule as to direct conveyances our courts hold that where the property conveyed is reasonably proportioned in value to the *bona fide* debts paid with it, or if greater in value, the excess is applied to the payment of other just debts of the grantor, or left where the other creditors can reach it, the instrument is valid, though made with intent to hinder, delay or defraud other creditors, and the preferred creditor knew of such intent.

Lewy vs. Fischl, *supra*.

Owens vs. Clark, *supra*.

Sawyer vs. Colbert, *supra*.

Smith vs Whitfield, *supra*.

Greenleve, Block & Co. vs. Blum, 59 Tex., 126.

Black vs. Vaughan, 70 Tex., 49.

In Lewy vs. Fischl, just cited, the evidence showed that the preferred creditor knew that the debtor was insolvent, and that the sale to the preferred creditor was made with intent to hinder, delay and defraud the creditors of the maker, and especially the plaintiff. (65 Tex., 313.) But the court said at p. 320: "If the debt due Fischl was *bona fide*, and the Mareks actually owed, as it was admitted they did, the other debts provided for in the bill of sale, the purpose of the Mareks in making the transaction to defraud other creditors, actually known to Fischl when he accepted it, would not vitiate the transaction. The law, as recognized by this court, is stated in the case of Greenleve, Block & Co. vs. Blum, 59 Tex., 126, and the distinction between a creditor and a pur-

chaser, in the acceptance of such transfers, is distinctly announced."

By reference to the case of Greenleve, Block & Co. vs. Blum, cited by the Court, it will be seen that the distinction alluded to is this: A creditor who receives no more property than is reasonably equivalent in value to his debt, is not affected by notice of fraud in the conveyance, but a purchaser of the property is affected by such notice.

In accordance with this well settled principle it was held in Allen vs. Carpenter, 66 Tex., 138, that when a creditor took from his debtor more property than was reasonably necessary to pay his debt, he stood in the same position as any other purchaser, and if there was fraud in the sale and the creditor had notice of it, the sale was void as to other creditors. At the same time it was said that if the property had not been more than sufficient to pay the preferred debt the creditor would not have been affected by a knowledge of the insolvency of the debtor and his intent to hinder and delay other creditors. In Black vs. Vaughan, 70 Tex., 49, the same doctrine is asserted and the same distinction drawn between a purchaser and a preferred creditor. This last case is cited in Sanger vs. Colbert, 84 Tex., 672, as authority for the doctrine there distinctly announced as settled by the decisions of the Texas courts, viz., that a creditor has a right to take property sufficient to pay his debt, even if the debtor, with his knowledge, was insolvent and intending to defraud his creditors. See also Owens vs. Clark, *supra*.

These decisions rest upon the sound basis that where a debtor conveys no more property than is reasonably sufficient to pay a *bona fide* debt, and the creditor accepts it with the view of obtaining payment of such debt, a perfectly lawful disposition of the property is made, and the intent of the

debtor cannot affect the transaction. Hence, no notice of such intent on the part of the preferred creditor can vitiate it as to him. But where the debtor, instead of appropriating his property to the payment of his just debts, takes in return for it something that can not be reached by his creditors, he is devoting it wholly or in part, as the case may be, to his own benefit, and placing it beyond the reach of his creditors. His intent is fraudulent, and if the purchaser is put upon notice of such intent the sale is vitiated. If the conveyance be to the creditor of more than enough to pay his debt, the excess is placed beyond the reach of other creditors; and if the preferred creditor gives for such excess money or a negotiable note, or anything else that the process of law can not reach, he is upon the same plane with any other purchaser.

The transaction is valid if the purchaser is not chargeable with notice of fraud in the conveyance, if there be any, and invalid if he is thus chargeable. In accord with this view as to purchasers, we find that in Sweeney vs. Conley, 71 Tex., 543, a sale to a purchaser who agreed to pay off certain debts of the insolvent vendor, was upheld. In Elser vs. Graber, 69 Tex., 222, it was held that a preferred creditor might receive from his insolvent debtor more property than was necessary to pay the debt due the former if he bound himself to apply the excess to the payment of other debts of the insolvent. See also Frees vs. Baker, 81 Tex., 224; Ellis vs. Valentine, 65 Tex., 548.

It is very apparent from the several decisions we have cited that the law as to notice of fraud in case of a purchaser for money from an insolvent is very different from that which is enforced as to a purchaser from such a vendor in payment of a previous debt. In the former case, the purchaser removes from the reach of creditors a portion of the insolvent's estate,

and converts it into money which goes into the insolvent's pocket. If, therefore, such purchaser have notice that he is doing this illegal act, he must desist or have the transaction set aside. But in the latter case he does not remove the property from the reach of creditors, but make it go towards the payment of a just debt; and the payment will be good as to him, no matter what may be the intention with which it is done, and hence notice of such intention can not affect the conveyance. To do this the preferred creditor must have participated in the fraud. In the language of our Supreme Court, in Haas vs. Krause, 86 Tex., 689: "He may have known that the debtor would not have given him the security, but from a desire to defeat some other creditor in the collection of the sum due him, but this would not render it unlawful for him to take security for payment of the sum due."

Upon the distinction we have alluded to between a sale to a purchaser for money and that to a preferred creditor rests the decision we have already referred to, in Simmons Hardware Company vs. Kaufman, 77 Texas. There mortgages of more than enough property to secure the preferred debt are placed upon the same plane with direct sales to such preferred creditor of not more than enough to pay his debt, and the conclusion naturally follows that mere notice to such creditor of fraud in making the mortgage is not sufficient to vitiate it, but he must be a participant in the fraud itself for this effect to be produced.

We make these suggestions as to what notice of fraud will vitiate mortgages giving preferences, and also as to the effect of mortgaging more property than will secure the preferred debts, not because it is necessary to sustain the positions assumed on this subject in order to reverse the judgment below, for we confidently expect to show by the evidence that

the property mortgaged to Sonnentheil was not more than enough to secure the preferred debts, and that there was not a scintilla of evidence to show that the preferred creditors had any notice, express or implied, of any fraud in the deed, if such existed. If, however, the views taken on those questions are correct, the judgment must necessarily be reversed without consideration of the question of notice, as the proof is direct and positive that the preferred creditors who accepted the deed before levy of the attachment so far from participating in the fraud knew nothing of it whatever.

This leads us to the further principle established by the decisions of Texas, viz., that a deed of trust must be accepted by some *bona fide* creditor secured therein, in order to make it take effect.

## AUTHORITIES.

Milling Co. vs. Eaton, 86 Texas, 401.

Tittle vs. Van Lear, 29 S. W. Rep., 1069.

This acceptance may be by acts as well as in express words.

Hubbard vs. Cox, 76 Texas, 239.

The rule is the same as in the acceptance of other contracts, deeds, etc.

Milling Co. vs. Eaton, *supra*.

Tuttle vs. Turner, 28 Texas, 759.

The Texas decisions are in accord with the general law on the subject.

Bump on Fraudulent Conveyances, 347, 348.

Ex parte Curry, 12 Arkansas, 302.

Wharton on Contracts, 8; 2d Ib., 707.

Pomeroy on Contracts, Sec. 69.

The acceptance, however, of any one *bona fide* creditor, not

affected by the fraud, is sufficient to sustain the deed, though all other creditors fail to accept, or have fictitious debts, or are tainted with the fraud.

Tittle vs. Van Lear, 29 S. W. Rep., 1069.

Howell vs. Mars, 82 Texas, 493.

Haas vs. Kraus, 86 Texas, 687.

Rock Island Plow Co. vs. Hill, 32 S. W. Rep., 242.

White vs. Sterzing, 32 S. W. Rep., 909.

The two cases last cited are decisions of the Court of Civil Appeals, an intermediate court, but under our judiciary system the decisions of this court become as authoritative as those of the Supreme Court itself when the latter court refuses a writ of error to have them reviewed, which is the case as to the decisions cited.

We now proceed to apply the Texas law as to the validity of deeds of trust securing creditors, to the facts of this case. *First, as to the acceptance of the deed by a bona fide creditor prior to the levy of the attachment.* The deed was made on the 16th of December, 1892, and filed in the County Clerk's office the same night. (Record, p. 123.) The goods were seized by the marshal, under the attachment sued out by the Moerlein Brewing Co., on December 23, 1892. (Ib., 106.) A. W. Fly was one of the creditors secured in the deed—the first on the list. (Ib., 121.) His debt was *bona fide*. (Ib., 151, 196.) He was informed by Sam Kramer of the deed of trust the night it was executed and that he was secured in it. He answered that it was all right, and repeated the same thing the next day. (Ib., 151.) Adoue & Lobit were *bona fide* creditors secured in the deed. (Ib., 121, 151, 196.) The trustee, Sonnentheil, informed Adoue the morning after the failure of Freiberg, Klein & Co. that Adoue & Lobit were secured, and he wanted Mr. Adoue's assistance in the management of the business. Adoue con-

sented; said it was all right, and hoped his firm would get its money back. Adoue attended two or three meetings with the assignee, where questions as to the management of the trust were discussed—one meeting the day he was informed of the failure, and two more a few days afterward. (Ib., 151, 152.) M. Marx testified that he was agent for S. A. Walker, one of the preferred creditors. He was authorized by Walker to accept, under the deed of trust, for him, and witness did so, and assented to the deed the next day after it was made. (Ib., 155.) All this was prior to the levy of the attachment (Ib.), and there was no evidence whatever to contradict or impeach the positive statements of these creditors. Fly's debt was $3,918.63, and was not secured otherwise than by the deed of trust. (Ib., 151.) Adoue & Lobit's debts amounted to $15,000, of which $10,000 was secured by Fellman & Grumbach's endorsement, and the other $5,000 secured by the deed of trust alone. (Ib., 151, 152, 153.) Walker's debt was a *bona fide* claim for $15,000. (Ib., 155, 126, 196.) Although the uncontradicted evidence showed that these creditors had unequivocally accepted the deed immediately after its execution, the trial Judge submitted to the jury the question as to whether or not any creditor had accepted the deed. The Judge said in his general charge to the jury: "If you don't believe these creditors accepted, or any of them, before the attachment was levied, you will return a general verdict for the defendant, but if you find some of the creditors, or any of them, did, before the attachment, then you are to inquire into the question whether fraud existed or not." (See eighteenth assignment of error; Rec., p. 277; bill of exceptions, Ib., p. 249.) The jury were, under this charge, without any instruction of the Court as to what constituted acceptance, allowed to defeat the plaintiff's recovery if they be-

lieved that Walker did not accept when his duly authorized agent swore, in so many words, that he did accept, and there was nothing in the evidence to contradict the statement. They were further allowed to find, as a fact, that neither Fly, nor Adoue & Lobit, had accepted, when the uncontradicted facts showed that they had done acts which in law amounted to an acceptance, thus leaving the jury to determine a matter of law which the Court should have decided for them. We have seen that in Texas an acceptance is implied from conduct (Milling Co. vs. Eaton, 86 Tex., 40, 405), or may be established by circumstances (Hubbard vs. Cox, 76 Tex., 239, 242). If there is a conflict of evidence as to the circumstances the jury determines as to their existence; but, when established by positive evidence, the Court determines as a matter of law whether or not they constitute acceptance. The Court's charge allowed the jury to find that there was no acceptance in spite of all this proof, and thereby defeat the plaintiff's case.

In addition to the Texas authorities already cited, we respectfully refer the Court to Devlin on Deeds, Sec. 261; Wharton on Contracts, Sec. 8; 2 do, Sec. 707; Pomeroy on Contracts, Sec. 69; Burrill on Assignments, Sec. 289. The positive statement of Marx that he accepted the deed for Walker, and had authority to do so, was in itself enough to make the deed effective as to that creditor under the rule in Texas, as we have already seen. Added to this were the like positive statements of Fly and Adoue, that when informed of the deed of trust, and that their debts were secured in it, they said it was "all right," which was a clear assent to the deed, and there was a like assent by Adoue, coupled with assistance by him, in making the assets pay off the secured debts.

It being the law of Texas that a trust deed must be ac-

cepted by some *bona fide* secured creditor to give it effect, it was a matter of vital importance to the plaintiff's case that this acceptance should be established, and if proven, that it should not be within the power of the jury to find that it was not; and that they should not be led to suppose that there was evidence tending to contradict the acceptance by reason of the Court having left to them the finding as to the fact of acceptance.

This court, in U. S. vs. Breitling, 20 How., 254, said: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts upon which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the evidence." Here the jury were doubtless led to believe that the Court supposed there was some evidence upon which they could find that there had been no acceptance of the deed by any secured creditor previous to the levy of the attachment, when there was no evidence of that kind whatever.

Rulings similar to the above were made in Goodman vs. Symonds, 20 How., 359, and Ins. Co. vs. Baring, 20 Wall., 159.

Indeed, this is the universal ruling of courts even in Texas, where judges are forbidden to charge on the weight of testimony, and very slight evidence is held sufficient to take a fact to the jury.

## AUTHORITIES.

Wintz vs. Morrison, 17 Tex., 387.

20 G. N. R. R. Co. vs. Stewart, 57 Tex., 166, 170.

Hudspeth vs. Robinson, 18 Tex., 858.

Thompson on Trials, Secs. 1016, 1017, 1027, 1030, 2245.

If there were no other error in the proceedings of the court below this one is sufficient for a reversal, for the jury may have believed that the deed was not tainted with fraud; or, if thus tainted, that the secured creditors, or some of them, had no notice of it, and that everything else was right; yet, if in their view of the case the acceptance was not sufficient, they could find for the defendant. As the verdict was a general one, this may have been the ground upon which it was rendered.

In addition to the uncontradicted evidence that the three creditors just named accepted the deed, there was also ample proof of acceptance by the three corporations represented by Lasker. He was vice-president of the First National Bank of Galveston (a creditor secured in the deed); also, a director and chairman of the finance committee. (Rec., p. 145.) It was his duty to pass upon all credits as he deemed best at the time with or without consultation with other members of the finance committee. For fifteen years he had thus acted, and not a single act of his had been repudiated or his authority questioned. It had been his custom to look after debtors of the bank failing to pay their debts at maturity, or who became insolvent after or before their debts matured. This was a recognized custom of the bank, and he was thus acting at the date of the failure of Freiberg, Klein & Co. This bank accepted the security of the deed of trust made December 16,

1892. Sonnentheil came to him, and whilst Lasker did not say to him in so many words, "I accept," as he did not see any occasion therefor, he treated it as a benefit extended to the bank, and that it was his province to deal with it. On cross-examination he stated that he had done such things before, and they were sanctioned by the company. (Ib., 146, 149.) Witness also testified as to his relations to the Citizens' Loan Company and the Island City Savings Bank, which were about the same as towards the First National Bank, except that in the Citizens' Loan Company no loan was made without getting the approval of the other members of the finance committee in meeting, and the president was consulted in the case of the Island City Savings Bank. Witness was present at a meeting of the creditors secured under the deed of trust held before the levy of the attachment. It was the understood agreement of the Citizens' Loan Company and the First National Bank that he represented them at the meeting, and Kempner, president of the Island City Savings Bank, asked him to speak for that institution. He was there for the purpose of representing these corporations as accepting creditors under the deed of trust. They discussed at the meeting the employment of the former owners, and as to selling on a credit. He had frequent interviews with Sonnentheil as representative of the three institutions, the most notable of which was the next day after the failure. He gave him advice on the above matters. (Ib., pp. 145-149.)

The claims of these institutions were *bona fide*. (Ib., pp. 196, 220.)

The plaintiff asked the Court to charge that an acceptance need not be in writing; that to constitute an acceptance the word "accept" need not be used; but that if a creditor informed the trustee that he was willing to accept the security

and benefits provided for him in the deed of trust, he accepted it. That a corporation acted through its authorized agents. If Lasker accepted for the above corporations, and had authority to do so, either express or implied, the corporations accepted. That in considering his authority they would consider the offices he held, his previous conduct therein, and the sanction, if any, given by said corporations to his acts of similar nature, and to his acceptance, if any, in this matter. (Ib., pp. 80, 81.) This charge the Court refused (Ib., p. 274), but charged the jury that the acceptance must have been by a person expressly authorized by the company, or by a party in the management of the business, and the company must have known of the acts thus performed, and acquiesced in them. (Ib., p. 94.)

The authorities all sustain the charge asked. By permitting Lasker to exercise the functions he performed in this case, the companies, or at least some of them, held him out to the world as having authority to exercise them, and this, though the agent, had no such authority.

In Martin vs. Webb, 110 U. S., 7, the cashier of a bank had assumed to cancel a note and release a mortgage given to secure it. He had no authority by virtue of his office to do so; but this Court held that his authority might be inferred from the general manner which for a long period—sufficiently long to establish a settled course of business—he had been suffered, without interference or inquiry, to conduct the affairs of the bank. See also Com. Ins. Co. vs. Union Mutual Co., 19 How., 318; Mining Co. vs. Anglo-California Bank, 14 Otto, 192.

In Fifth Ward Savings Bank vs. First National Bank, 48 N. J. Law Rep., 513, it was held that if the treasurer of the company was held out by the managers as agent without par-

ticular authority his acts as such agent would be binding, and that question should be submitted to the jury.

Upon the same subject we cite Gulick vs. Grover, 33 N. J. Law Rep., 463.

1 Potter on Corp., 68, and authorities cited.

1 Beach on Corp., 186, 187.

In Ind. Rolling Mill Co. vs. St. Louis, Fort Scott and Wichita R. R. Co., 120 U. S., 256, it was held that ratification will be presumed unless disaffirmance occurs within a reasonable time.

In Page vs. Fall River, etc., Co., 31 Fed. Rep., 257, it was held that the unauthorized acts of a treasurer in borrowing money for a corporation were binding, as the directors by their course of conduct had held out the treasurer as fiscal agent for the corporation.

See also Thompson on Corporations, Arts. 4661, 4663, 4881, 5883, 4884, 4893.

The refusal of the above charge, made the subject of the fourteenth assignment of error (Ib., 274), was particularly damaging to plaintiff's cause in that it left the jury to infer, from the Court's general charge, that the corporations for whom Lasker acted must have known of his acts in this particular matter, and acquiesced in what he had done "in the premises." It may have been the intention of the Court to charge the law as it is contained in the refused instruction, but the language is capable of the interpretation we have given it, and tended to confuse the jury, and the instruction asked and refused would have made it more explicit and easily understood. The law is as in 120 U. S., 126, *supra*, that ratification is presumed unless disaffirmance occurs in a reasonable time. Ratification of the particular acts relied on as acceptance is not necessary; it is sufficient if the agent has acted

in like matter in former times, and these acts have not been disapproved.

The points we make as to the acceptance are taken under the eighteenth, fourteenth and twelfth assignments of error, and are as follows:

1. That the acceptance by Fly, Adoue & Lobit and Walker, three *bona fide* secured creditors, having been fully proven to have taken place before levy of the attachment, and no evidence contradicting it having been offered, and the acceptance of one *bona fide* creditor being sufficient, the Court should have so charged, and not left the question of acceptance to the jury.

2. That the Judge should have given our special charge as to acceptance by an agent of corporations, and not led the jury to believe that Lasker's acceptance should have been acqiesced in by the corporations.

*2. Were the accepting creditors tainted with the fraudulent intent of the deed, if any such intent existed?*

It is claimed that the deed was fraudulent for several reasons, but the Court will find, upon examination, that the matters alleged against the instrument are either insufficient to show that it was fraudulent, or if any of them are sufficient for that purpose, the secured creditors, or at least such as accepted the deed, had no notice of them at the time of acceptance.

1. It is claimed that the provision in the deed authorizing and requiring the trustee to sell as soon as possible and convey the personalty in parcels, or as an entirety, at public or private sale, gives him power to sell on credit and put the property into negotiable paper, secure against process of creditors. Also, that it gives the trustee a discretion that

enables him to consume an indefinite time in realizing on the goods. It is difficult to see how an express requirement, that the trustee shall sell the trust property "as speedily as possible" and out of the proceeds of the sales pay expenses and preferred debts, authorizes him either to delay sales or sell on credit. This construction is directly opposed to the ordinary signification of the language which seems to have been inserted for the express purpose of insuring an early conversion of the assets into cash proceeds for the purpose of paying creditors. The authorities relied on are not applicable to the facts.

2. It is also claimed that the first trust deed was altered by erasing the power given the trustee to adjust and compromise the debts and claims conveyed to the trustee, and that a second deed of trust restored the erased words; and that this last deed added the power to each partner to act for all the others in the course of the business, which second deed was executed on Sunday, and was never recorded. The power added is part of a requirement that the partners shall make such further transfers, assurances of title, etc., as to the trust property, as may be necessary to facilitate the execution of the trust. This clause is usually inserted in such deeds to enable the trustee the better to administer the assets, and had been left out of the first deed by mistake, as was shown by the evidence of Mr. Levi, one of the firm of lawyers who drew the instrument. He also stated that the power given either one of the partners to make such assurances, etc., was inserted because it was likely to happen that some one or more of the members of the firm would be absent when the execution of these instruments was required. (Id., 222-224.) If the validity of the second deed was at all affected by its being made on Sunday—as to which, however, the evidence was conflict-

ing—the recorded deed was still in force, and this had not the clause to which the objection is raised.

3. It is claimed that the deed provides for attorneys' fees through the whole administration. It provides that the trustee may pay the expenses reasonably incurred by him for such servants, clerks, agents and attorneys as he may employ to assist him in the performance of his duties. The attorneys are not named, and their compensation is not fixed, as in the case of Hill vs. Agnew, 12 Fed. Rep., 283, cited by defendants in error. It is held in Texas, that even if the attorneys should be named, it would be no badge of fraud unless the choice of them was injudicious. (Baldwin vs. Peet, 22 Tex., 720, 721.)

This provision of the deed gives the trustee no power that he would not otherwise have had, as he has the right to employ counsel to protect the trust property.

4. It is further urged that the deed is fraudulent on its face, because the items of indebtedness secured are uncertain as to amount, date, maturity, etc. The exact amount of each debt secured is stated, except in two instances, which constitute about $5500 of the $141,000 provided for, and the amount of these is approximately stated. No greater particularity in this respect could possibly be required, especially under the Texas decisions. (Van Hook vs. Walton, 28 Tex., 59, 74.)

So much for the intrinsic matters alleged to show the deed fraudulent. The trial Judge held the two deeds valid on the face; and, as to the failure to record the second instrument, held that this did not vitiate, as the trustee was in possession of the property when it was made. (Id., 234, 235.) No exception was taken to this ruling, and no question as to the above points submitted to the jury.

Next, as to extrinsic matters, which it is claimed render the deed fraudulent:

1. It is claimed that the grantors of the deed retained possession of the property conveyed, either alone or concurrently, with the trustee. The evidence on that subject is simply as follows: Louis Werner, the agent of the Christian Moerlein Brewing Company, on whose affidavit the attachment was issued, a witness for the defendant, testified that, hearing of the failure of Freiberg, Klein & Co., he came to Galveston some three days after the deed of trust was made, and was introduced to Sonnentheil at the store of Freiberg, Klein & Co. That Seinsheimer and Freiberg were also at the store, and some of the clerks of Freiberg, Klein & Co. (Id., 210, 211.) L. A. Grelling, also a witness for the defendants, stated that he had been in the employment of the Brewing Company since the levy of the attachment, but previous to that time was employed by Freiberg, Klein & Co., and was in the employment of the trustee from the day of the failure till the attachment was levied. (Id., 197.)

Sonnentheil, the trustee, testified that he took possession the night the deed of trust was executed. The keys were delivered to him along with the deed the evening it was executed, December 16, 1892, and from that time he exercised control of the establishment; no one had control or possession but himself. He made no agreement with anybody about employment in the trust before he took charge. All who were employed, including the grantors and the former employes of Freiberg, Klein & Co., were under his direction and were employed by him, and he told them that as long as he had use for them, and their services were satisfactory, he would keep them, but not a day afterwards. He paid their claims, and dismissed them when there was no further use for them. He made no

attempt to conceal the fact that he employed those people as his servants. He employed them because he thought he could best administer the trust speedily for the benefit of the beneficiaries of the deed, and all parties, by retaining the old hands for a time. (Id., 115, 116, 136.)

There was no evidence to contradict this, and as the testimony fully explains the presence of the grantors and other employes in the store after Sonnentheil took possession, the fact that they were present and assisting the trustee is fully explained. The trustee had a right to call these employes to his assistance. (Van Hook vs. Walton, 28 Tex., 59, 74.) The law of Texas, in this respect, is not different from that of Alabama, and this court said in the case of Bamburger vs. Schoolfield, 160 U. S., 149, that if nothing else appeared but the mere employment of the grantor by the trustee to assist in the disposition of the goods and getting in the book accounts, this circumstance would not show the transaction fraudulent. Even if at the time of sale there had been an agreement to employ the vendor, this fact would not of itself make the sale invalid. In the case at bar there was no such agreement, and the conduct of the grantor and clerks was fully explained and accounted for. It was, therefore, a much stronger case for enforcing what this court further said in the foregoing case, that is, that the court could have affirmatively instructed "that the employment of the vendor in a clerical capacity could not affect the validity of the sale." It might be added, if necessary, that even if the employment of these parties was fraudulent, the creditors, who had accepted the deed before such employment occurred, or, at least, became known, could not be affected thereby. And even had the acceptance happened afterwards, inquiry would have led to a knowledge

that the trustee had employed them on salaries for the benefit of the trust fund, a perfectly legitimate transaction.

2. It is further urged that the deed was fraudulent because it preferred creditors who already held personal security for their debts.

The evidence shows that Fly, whose preferred claim was for $3,918.13, had no other security for his debt, and that Adoue & Lobit held a note for $5,000.00 that was preferred in the deed, for which they had no other security other than the deed of trust. (Id., pp. 151, 153, 154.) These two claims being sufficient to validate the deed, this point might be here dismissed, but the question made has been decided against the contention of defendants by the Court of Civil Appeals of Texas in passing the very deed of trust we are now considering, Sonnentheil vs. Texas Guaranty & Trust Co., 30 S. W. R., 945. It was there held that the following charge, asked by Sonnentheil's counsel, should have been given to the jury:

"I charge you that the fact that a debt secured by a deed of trust is also secured by personal endorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditors regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as endorser on his claim, when he had no notice of such fraud or reasonable cause to suspect it, at or before the execution of the deed." (30 S. W. R., p. 950.)

This is in accord with the principle that a creditor may secure, with liens upon property, a debt already secured by personal endorsement, and is supported by abundant authority.

Kruse vs. Prindle, 8 Oregon R., 162.

Strong vs. Skinner, 4 Barb., 546.

Worland vs. Kimberlin, 6 B. Monr, 608.

Burrill on Assignments, Sec. 116.

3. It is also urged that the deed is fraudulent because, as is alleged, the property mortgaged exceeds in value the amount of debts secured. We have already shown that in Texas it is not fraudulent to secure a creditor by mortgaging property in excess of his debt. (Simmons Hardware Co. vs. Kauffman, 77 Tex., 131.)

And that a direct sale of more property than is necessary to pay a preferred debt is not void if the excess is not placed beyond the reach of creditors.

Applying these principles to the present instrument we find, first, that it is a deed of trust, providing that if any surplus or balance of the trust property and assets or of the proceeds remain, after paying the preferred debts, it is to be paid over to the mortgagors. (Id., 122.) The excess is thus left subject to the claims of other creditors.

In this view of the matter, it is unimportant whether the value of the property exceeded the amount of the secured debts, or how much was the excess. But secondly, no such excess existed. Freiberg testified that he considered the property worth about $220,000, some $75,000 more than the preferred debts. (Id., 194.) The trustee gave a careful and accurate statement of the value of the property as follows:

| | |
|---|---|
| The nominal value of the assets received by him was | $317,000.00 |
| Of these, the amount of worthless notes on insolvent persons was (Id., 117, 139, 140) | 157,000.00 |
| This left as available assets | 160,000.00 |
| The debts amounted to something over | 140,000.00 |
| Leaving an excess of, or about, one-seventh of the indebtedness | $20,000.00 |

If we take from this the probable expenses of the trust (trustee's commissions, rents, insurance, taxes, employes' wages, fees of attorneys, etc.), this $20,000 will be well nigh, if not entirely, consumed.

It was shown that they were not wasted, and did not depreciate in value in the hands of the trustee. (Id., 140.) One hundred and thirty-five thousand dollars would be the value of the estate if he succeeded in suits that he had brought, including the present one. (Id.)

In making this estimate, the trustee valued the goods seized under the present attachment at $84,000. If we are to take the estimate of the defendant's witnesses, derived from an actual sale of their goods, they were worth only $51,258.16. (Ib., 212.) That this is the true test in comparing their value with the amount secured, see La Belle vs. Tidball, 69 Tex., 165, 166. So the value of the property mortgaged was really less than the debts secured by several thousand dollars. We respectfully submit that the best test of the value of the mortgaged property is the amount realized for it in its careful administration. Even if we take the estimate of Freiberg, and deduct from it the worthless notes which entered into his calculation, we have a margin of excess amounting to only about 14 per cent of the amount of debts to be consumed in the expenses of the trust.

In the above cited case of Simmons Hardware Co. vs. Kauffman, the trial court found that the property mortgaged was worth $34,000, or an excess of $9000 over the $25,000 secured, and that this was not more than enough to secure the debt against all contingencies, and this finding was approved by the Supreme Court. The percentage of excess was more than twice as much as exists in this case, and the probable

contingencies here were much greater, as there lands only were to be administered, and here a stock of goods was to be sold, choses in action collected, and various other kinds of property disposed of.

Our decisions do not require, even in cases of direct sales to preferred creditors, that the property shall be exactly or nearly equal to the amount of debts paid, but that it shall be reasonably proportioned to the debts.

In proportioning the property in case of a deed of trust, the expenses of the trust must be considered, and the discrepancy between the debt and the property may be greater than in case of a direct sale. There is no authoritative decision in Texas to the contrary, the opinion cited above being the last utterance of the Supreme Court on the subject. (See also La Belle vs. Tidball, *supra*.)

4. It is also claimed that the deed of trust was void for actual fraud because it was executed in pursuance of a conspiracy gotten up by the grantors and Fellman & Grumbach, endorsers on a large amount of their paper, in which it was agreed that the grantors should continue business, though insolvent, and buy goods on a credit, and should at the proper time fail and sell to Fellman sufficient goods to secure him against loss by reason of his endorsement. Fellman was father-in-law of Seinsheimer, one of the members of the firm, and Grumbach and Seinsheimer had married sisters. H. Kempner was charged to be a participant in the alleged conspiracy, and he was a creditor of the grantors and brother-in-law of Seinsheimer.

It is claimed that this agreement was first entered into in February, 1891, and was kept alive by subsequent interviews of the parties had in April of that year, and in February, 1892.

It is further claimed that, in pursuance of this scheme, the firm did continue business, and did buy goods on a credit, even during the summer of 1892 and up to within a short time of their failure, and that the deed of trust in question was executed in pursuance of the agreement.

Evidence was introduced showing an interview between Fellman and Freiberg, one of the firm, a few days before its failure, in which the former stated that when he bought out the firm's stock he would let it continue business in his name till it could settle with creditors. (Id., 187-195.)

Evidence was introduced to show that in March, 1891, February, 1892, and September, 1892, the firm made to Dun's Agency false representations as to its financial condition, showing itself solvent when it was not. (Ib., 199, 200, 201, 206, 207.)

Also, that Seinsheimer, one of its members, retained for awhile from the trustee some of the bills receivable of the firm, but turned them over when they were demanded by the trustee. (Id., 120.)

Some matters occurring after the trustee was in possession of the trust property, and administering it, were admitted in evidence over the objections of plaintiff. These consisted of entries made by Seinsheimer in the old books of the firm. (Id., 130.) Attempts of some members of the firm to get possession of some of its assets without the knowledge or against the consent of the trustee. (Id., 129, 130, 132, 133.) Declarations of one of the grantors as to what would be done in reference to a settlement of the firm's debts. (Id., 211.)

The foregoing are substantially all the grounds relied on to show that the deed of trust in question was made with fraudulent intent.

An analysis of them shows that none of these relied on, as appearing on the face of the deed, find any support in law, and the trial Judge so charged the jury.

That of those depending on extrinsic evidence, the law does not sustain that which attacks the deed because a portion of the creditors were secured by personal endorsement. That the undisputed facts show that the grantors did not retain possession of the goods, either absolutely or concurrently with the trustee.

That the undisputed facts show that the property mortgaged was not more than reasonably sufficient to pay the preferred debts, and the expenses of the trust, and if it was, the excess was not sufficient to be evidence of fraud. That the preferred creditors could not have known at the time that they accepted that there was any excess, and that by the laws of Texas an excess of property over the debts does not vitiate a deed of trust.

There is but one ground left upon which the deed of trust is attacked for fraud, viz., the alleged conspiracy between the grantors and Fellman to protect the latter by a sale of their goods to him, and thereby to defeat their other creditors. The other matters from which a fraudulent intent is sought to be inferred, such as the false representations to Dun's Agency and purchases of goods just previous to failure, seem to be relied on as being in furtherance of the alleged conspiracy, but whether introduced for that purpose or as independent facts, tending to show fraud, our defense against them is that the preferred creditors had no notice of their existence when they accepted the deed of trust. Bearing in mind that, under the law of Texas, if one *bona fide* preferred creditor accepts the deed without notice of any fraudulent intent in

its execution, the deed is valid, we proceed to show from the evidence that the defendants utterly failed to prove that the accepting creditors had any such notice before accepting.

The facts relied on as to the conspiracy—the false representation as to solvency and the purchase of goods just previous to the execution of the deed of trust—have been already briefly stated. We now add that as to the conspiracy alleged to have been concocted at meetings held in February, 1891, April, 1891, and February, 1892, Freiberg, the witness who testified as to what took place at these meetings, also swore that neither of the beneficiaries in the deed knew anything of these meetings or what occurred at them. Also, that neither of them knew of the interview between himself and Fellman, which, he testified, occurred a few days before the deed of trust was made. (Id., p. 197.)

As to the false representations made to Dun's Agency, and the purchase of goods by the firm from the Christian Moerlein Brewing Co., there is a total absence of all evidence to show that the beneficiaries of the deed knew anything as to these when they accepted the deed. It is to be remarked, also, that it was found that the firm bought no more goods than was necessary for the proper running of their business. (Id., 196.)

As to the failure of Seinsheimer to deliver to the trustee some of the bills receivable till demanded, this fact could not have affected the transaction, and hence knowledge of it could not have had any such effect, and no such knowledge, was proved

We are led to the inevitable conclusion that so far from the the evidence showing that the trustee and beneficiaries participated in any fraud with which the deed may have been tainted, there was no proof that the trustee, or any one of the accepting creditors, had any knowledge whatever of such fraud.

As we understand the contention of defendants, it is not that the preferred creditors or trustee had such knowledge, but that they were affected with constructive notice of the fraud, *i. e.*, that they had knowledge of facts which put them upon inquiry as to the fraud, which inquiry, if properly pursued, would have led to such knowledge.

We proceed to show: First, that the creditors were not put upon such inquiry; second, that such inquiry would not have led them to a knowledge of fraud; third, that if put upon inquiry and it would have led to a knowledge of the fraud, the deed would still have been valid as to the accepting creditors.

1. The only fact which it is contended was known to the accepting creditors was the insolvency of Freiberg, Klein & Co.

As to this we say: 1. That if Freiberg, Klein & Co. were insolvent when they made the deed, and this insolvency had been known to all the accepting creditors, it would not have put them upon inquiry as to fraud in the deed.

An insolvent debtor having the right to prefer creditors, notice that the debtor making the preference is insolvent can not possibly put upon inquiry as to fraud. It is notice of the performance of a lawful act. To hold the contrary would be to charge a preferred creditor with notice of fraud whenever it occurred in an instrument preferring creditors, made by an insolvent, and to render all such invalid when made with fraudulent intent, regardless of actual notice to the preferred creditor.

In Scott vs. McDaniel, 67 Tex., 316, and in numerous other Texas decisions, the right of an insolvent to prefer creditors is asserted. In Simmons Hardware Co. vs. Kaufman, 77 Tex., 131, the distinction between sales by insolvents and deeds of trust made by them to preferred creditors, is recognized. In the former, knowledge of insolvency will vitiate the sale if

more property is sold than is reasonably necessary to pay the debts, unless the excess goes to pay creditors or is left within their reach; in the latter, knowledge of insolvency does not affect the transaction as the excess is subject to other debts of the grantor.

2. There was no proof that the accepting creditors knew that Freiberg, Klein & Co. were insolvent. Indeed, the proof is directly to the contrary. The evidence relied on to show knowledge of insolvency is about this: Gorse, manager of Dun's Agency, testified as to the false statements made to the agency by Seinsheimer, which showed the firm to be solvent. The last, or September statement, was made at his request, as he had information from other sources that the firm was shaky and their credit suffering. He regarded the statement as showing a healthful financial condition, provided it was correct. Rumors were afloat in Galveston, general in their character, that they were slow in their payments, owing largely to banks and individuals. These made the witness desire to post himself as to the foundation of them, and he inquired without successful results, as Seinsheimer and Grelling misrepresented their financial condition and the banks would not tell him about the firm's affairs so far as related to the banks. The rumors were of sufficient importance to suggest a most rigid investigation by interested parties. (Id., 206-207.)

The witness, on cross-examination, refused to give the names of the persons from whom he heard the rumors, saying that it would be a breach of faith to do so. (Id., 208.)

Werner, agent of the Brewing Company, said that the company learned from their agent that certain traveling men had told him that Freiberg, Klein & Co. had been refused credit. (Id., 212.) This led him to make inquiries as to their financial condition, as they owed the company a large amount. He

went to Dun and Bradstreet and told them he wanted special reports, as they were supplying them with goods, and wanted to know their true condition, etc. After reading over the statement at Dun's Agency he concluded they were all right. (Id., 210.) This is about the sum and substance of the evidence relied on to affect the beneficiaries with a knowledge of Freiberg, Klein & Co.'s insolvency. On the other hand, it was proven by A. W. Fly, an accepting creditor, that the evening the deed of trust was made he heard some little rumors that the failure was contemplated. (Id., 151.) Lobit, of Adoue & Lobit, accepting creditors, said he did not know the failure was imminent or impending. (Id., 153.) Indeed, so little did this firm suspect the insolvency of Freiberg, Klein & Co. that it loaned them $5,000, without security, only thirteen days before the failure. (Id., 153.)

Stowe, cashier of the First National Bank of Galveston, an accepting creditor, testified that he heard no rumors during the fall of 1892 or before, as to Freiberg, Klein & Co.'s insolvency, and had there been such in Galveston, he would have heard them. He considered them good, and renewed their paper whenever asked to do so. (Id., 221.)

Beers, secretary of the Citizens Loan Co., an accepting creditor, testified that he was also an insurance agent, was in touch with all the banks, and met people in his office engaged in financial matters. Had there been rumors of the firm's insolvency within two or three months of its failure he would have heard them. He had heard no such rumors, and was surprised to hear of the failure. (Id., 220.)

Sonnentheil, the trustee, said he heard of the expected failure on the Monday before the 16th of September, 1892, when he was asked by Fellman to act as trustee. (Id., 118.)

There was other testimony tending to show that the accepting creditors had never heard the alleged rumors, and none to show that they had. (Id., 151, 153, 145.)

3. If rumors of insolvency are to be treated as putting a creditor upon inquiry as to fraud in a deed of trust preferring them, this would not be sufficient to charge them with constructive notice of fraud unless the inquiry suggested would have led to a knowledge of the fraud. The party who started out in search of fraud, induced by such rumors, would have nothing to guide him to persons or papers. He would not be bound to apply to the grantors, and if he had he would probably have received the same information they gave to Dun's Agency; and if he had applied to that agency, he would have received the same information given to Werner, and its books would have showed the firm to be solvent. But knowledge of insolvency thus obtained would be no more than was learned from the deed of trust itself. The inquirer would have found no evidence of fraud, or anything to make him suspect it. This, if it existed, was in the breasts of the parties to it, and of them he was not required to seek the information. (Leading Cases in Equity, Vol. 2, Part 1, p. 166; La Neve vs. La Neve, 4 De Gex., Mac. & G., 473; Ware vs. Lord Egmont, 31 Eng. Law and Equity, 89.)

To sum up our contention as to notice, we claim: 1. That there is absolutely not a scintilla of evidence that the trustee, or the accepting creditors, participated in any fraud with which the deed of trust may have been tainted, or that they knew anything about it whatever.

2. That there is absolutely no evidence that they were in possession of any fact that put them upon inquiry as to fraud in the deed; the only fact relied on being that the makers of the deed were insolvent when the deed was made, and of this

some of them at least knew nothing until the deed was actually executed, and knowledge at that time could not affect the rights of the beneficiaries.

3. That even if the accepting creditors knew of this insolvency, and it put them upon inquiry as to the circumstances under which the deed was made, this inquiry could not have led up to a knowledge of the fraud. The Brewing Company's inquiries led it to sell more goods to the firm on credit.

We, however, earnestly insist that, under the decisions of the Supreme Court of Texas, implied notice of fraud is not sufficient to vitiate a deed of trust preferring creditors, especially where the value of the property mortgaged is not unreasonably excessive for the purposes to which it is devoted, or not placed beyond the reach of creditors.

We further claim that the charge set forth in the sixteenth assignment of error should have been given, as it was undoubtedly the law, was material to the case, and had not been included in the Court's general charge. For the law governing this charge, see page 56 of this brief.

In such case the preferred creditor must have participated in the fraud, or known of its existence, and the deed will be good if one accepting creditor is not thus affected by express notice. Implied notice applies only to a purchaser, or one who, for the benefit of the grantors, and not to secure a just debt, helps them to place their property, or a portion of it, beyond the reach of their creditors.

This is decided exactly as stated in White vs. Sterzing, 32 S. W. Rep., 909; and in Rock Island Plow Co. vs. Hill, Id., 242, the Court goes further and says that "even if the creditors knew that the mortgagor gave the deed of trust, not from a desire to secure them, but to defraud others, still, if the ob-

ject of the creditors was to secure themselves in a just debt, the instrument could not have been set aside for fraud."

These two decisions of the Court of Civil Appeals have, as we have seen, been sanctioned by the Supreme Court. That court has held, substantially, the same in Haas vs. Kraus, 86 Tex., 687.

If, as held in Simmons Hardware Co. vs. Kauffman, *supra*, excess of property mortgaged over the amount of debts secured does not vitiate a deed of trust as it does a direct sale to the creditors; and if, as held in Lewy vs. Fischl, *supra;* Owens vs. Clark, *supra*, and Sanger vs. Colbert, *supra*, a knowledge of fraud in the sale does not affect a creditor who has taken property not unreasonable in amount to pay his debt, then *a fortiori*, a creditor who has been secured in a deed of trust by an amount of property not unreasonably in excess of his debt, is not affected by a knowledge of fraud in the deed securing him. We have shown that in Simmons Hardware Co. vs. Kauffman, *supra*, an excess of more than 33⅓ per cent in a mortgage was not deemed unreasonable. We add that in La Belle vs. Tidball, 69 Tex., 161, an excess of 50 per cent in a direct sale was held not to vitiate it. In arriving at the value of the goods in that case, 40 per cent of their invoice price was deducted. The Court held that the preferred creditor was not bound to take the goods at either their retail or wholesale price in the place where they were located. If we apply this rule in the present case we find that the property conveyed, by the highest estimate, was not of value greater than 33 per cent over the amount secured, and that its value, as ascertained by actual administration, was less than the debts secured. We, therefore, claim that it was incumbent on the defendants below to show that all the accepting creditors participated in the fraud alleged against the deed of trust, or, at

least, that they had knowledge of it before accepting, and that there should not have been any question made as to their mere knowledge of facts to put them upon inquiry as to fraud.

To sum up on the question of notice of fraud to accepting creditors: 1. The uncontradicted evidence shows no fraud in the deed of trust, unless it arises from the alleged conspiracy between the grantors and Fellman, and the acts said to have been committed by the former in pursuance of such conspiracy.

2. If such circumstances show a fraudulent intent in making the deed, there is not a particle of evidence to show that this intent was known to the accepting creditors, much less that they participated in it.

3. That there is not even the slightest evidence to show that these creditors were in possession of facts to put them upon inquiry as to any such intent, which inquiry, if reasonably pursued, would have led up to a knowledge of this intent. That putting the most favorable construction for the defendants upon the evidence, some of the accepting creditors may have heard that the grantors were thought to be insolvent, and that as even knowledge of insolvency does not vitiate such a deed, facts that would have led up to such knowledge can not possibly have that effect.

The trial court, therefore, erred, as claimed in the nineteenth assignment of error, in charging the jury in effect, that they should find for the defendants if they believed that the accepting creditors knew of any fraud in the deed or were possessed of such information as would have put a reasonably prudent person upon inquiry. (Id., 278, 379.)

That court also erred in refusing the fifth special instruction asked by plaintiff, and especially that portion which instructs the jury that mere knowledge of Freiberg, Klein &

Co.'s insolvency was not sufficient to put the creditors upon inquiry as to the alleged fraudulent intent. (Id., 273, 274.)

And as the evidence showed, without contradiction, that all the debts secured were *bona fide* (Id., p. 196), and the Court had properly held that the deed was valid on its face, and the taking of the goods by the marshal from the possession of the trustee was undisputed, and some of the creditors had accepted the deed, the Court should have given the charge asked by the plaintiff, made the subject of the twelfth assignment of error, the measure of damages stated in the charge being that established by the Texas decisions, as we now proceed to show.

*Third—As to the measure of damages:*

The Texas Statutes regulating this matter reads as follows: "Rev. Stat., Art. 201. The writ of attachment shall be levied in the same manner as is or may be the writ of execution upon similar property."

"Art. 2349. A levy upon personal property is made by taking possession thereof when the defendant in execution is entitled to possession. Where the defendant in execution has an interest in personal property, but is not entitled to possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one them where there are several."

"Art. 2353. Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold under execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, on complying with the conditions of the pledge, assignment or mortgage."

These articles have been frequently construed by the Supreme Court of Texas, and it has been universally held that property mortgaged or assigned can not be levied on by seizure as in other cases, and if it is seized the officers and parties ordering such levy are trespassers, and liable for damages to the extent of the value of the goods seized.

In Scott vs. McDaniel, 67 Tex., 315, and Stiles vs. Hill, Fontaine & Co., 62 Tex., 429, it was held that the sheriff had no right to attach and take from a trustee or mortgagee property of the mortgagor rightfully in possession of such trustee or mortgagee.

In White vs. Sterzing, 32 S. W. Rep., 909, the measure of damages in a case precisely like the present was held to be the market value of the goods taken from the trustee's possession. This opinion was adopted by the Supreme Court. In Perry vs. Stephens, 77 Tex., 249, the Court, passing upon a seizure of goods in the possession of an assignee, provided for in the same statutes, says: "This was an action against trespassers for seizure of property. They occupied in the suit the position of wrongdoers, and were not entitled to convert the action into an equitable proceeding for the adjustment of equities." In that case the attaching creditors claimed that they owned all the claims against the assignor except a few, and asked to fix the amount of these so that they might pay them and defeat a recovery. But the Court refused this, holding it the duty of the assignee to collect the assets and distribute them among the creditors, and that he should receive the value of the whole property seized under the attachment.

Even if an adjustment is allowable in such cases, it could not have taken place in this action, as there was no pleading setting up such equities, or asking for such adjustment. If

there was the defendant would not have been entitled to it. (White vs. Sterzing, 32 S. W. Rep., 910.)

This rule is well supported by the decisions of other states. Adams vs. Connor, 100 Mass., 515; Ullman vs. Bernard, 7 Gray, 554; Pomeroy vs. Smith, 17 Pick., 85; Treadwell vs. Davis, 34 Cali., 601, 606; and is laid down as correct by eminent law writers; Jones on Pledges, Sec. 433; 3 Suth. on Damages, 525, 526. It was adopted and enforced in Martin-Brown Co. vs. Henderson, 28 S. W. Rep., 695, a decision of an intermediate Texas court, and also enforced in Rock Island Plow Co. vs. Hill, *supra*, a case approved by the Supreme Court. (See also Linz vs. Atchison, 38 S. W. Rep., 640; Middlebrook vs. Zapp, 72 Tex., 321; Willis vs. Thompson, 85 Tex., 301; Gunter vs. Cobb, 82 Tex., 598.)

The trial Judge in this case adopted this as the law, but refused to incorporate it in the foregoing charge asked by plaintiff. As showing that the measure of damages was correctly stated in the charge asked, we refer the Court to Blum vs. Merchant, 58 Tex., 400; Heidenheimer vs. Schlott, 63 Id., 396; Wallace vs. Finberg, 46 Tex.. 35; Tucker vs. Hamlin, 60 Tex., 174; Sedgw. on Damages, 663, and the cases already cited.

The Circuit Court of Appeals, when this cause was before it, justified this refusal of the trial Judge on the ground that it asked him to make five distinct special findings of fact on complicated issues, in favor of the plaintiff. (Id., 284.) These five are doubtless as follows: 1. That the deed of trust was valid on its face. This was a question of law and not of fact, and the Court had found it in favor of the plaintiff, and no additional labor was imposed on him to include it in this charge. (Id., 284.) 2. That the secured debts were all *bona fide*. There was no complication in this issue, as there was no denial of it, and it was clearly proved, and

there was no evidence to the contrary. 3. That some of the creditors accepted the deed before the levy of the attachment. We have already shown that there was no conflict in the testimony as to this, but that it was distinctly and positively proved. 4. That these creditors had no notice of the fraud. We have shown that there was not a scintilla of evidence to show such notice, and the Court should have so charged. 5. That the marshal took the goods from the plaintiff, who was lawfully in possession of them, under an attachment sued out by the Christian Moerlein Brewing Company. That they were seized as stated was pleaded by the defendants themselves, and if the other facts stated in the charge were true, the trustee's possession could be nothing else but lawful.

It is clear, therefore, that there was no question to submit to the jury except the amount of damages to be found by the jury, and this the charge left open for its determination. Leaving the other matters to the jury was to assume as doubtful that which was clear, and to assume hypotheses at variance with the certain facts, which is held to be erroneous, even in Texas, where judges are forbidden to charge on the weight of testimony. (I. & G. N. R. R. Co. vs. Stewart, 57 Tex., 166, 170; Wintz vs. Morrison, 17 Tex., 387.)

Where there is no question of credibility of testimony or weight of evidence upon which the verdict depends, but an absence of evidence as a basis for a verdict for the defendants, the Court should instruct a verdict for plaintiffs. See Bondies vs. Ivey, 39 S. W. Rep., 158, and authorities cited; White vs. Sterzing, *supra*.

The decisions of the U. S. courts are even more rigid in requiring peremptory charges to the jury for one party where the other has failed to produce evidence to sustain its side of

an issue, and this more especially where the burden of proof is upon the party thus failing, as was the case in the matter of notice of fraud in this case.

In Chandler ys. Reeder, 24 How., 224, this court said: Whether there be any evidence is a question for the Judge; whether there be sufficient evidence is for the jury, and that the trial court erred in submitting the decisions of questions when there was no evidence to raise them. Here there was no evidence to raise the question of fraud, but merely as to notice of insolvency.

In Commrs vs. Clark, 94 U. S., 278, 284, this court went further and said: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." In this case there was not even a scintilla of evidence that would authorize the Judge to submit either the question of acceptance or of notice to the jury.

We also refer the Court to the following authorities sustaining the views already expressed: Sullivan vs. Mining Co., 143 U. S., 431; Armour vs. Hahn, 111 U. S., 313; Steamship Co. vs. Merchant, 133 U. S., 375. See also N. P. R. R. Co. vs. Clearless, 2 C. C. App., 39.

In asking the charge in question the plaintiff was pursuing the course pointed out by this court in H. L. & I. Co. vs. Unsell, 144 U. S., 439. We asked a peremptory charge to find for the plaintiff, and submitted no other instructions until this peremptory charge was refused. (Rec., p. 79, *et sequentes.*)

It would seem, however, under the decisions in T. P. Ry. Co. vs. Patten, 61 Fed. R., 259, this judgment could not stand, even if we had not asked the peremptory instruction, for in

that case it was held by the eminent Circuit Judge, who also rendered the opinion in the present case, that if we had failed to ask the peremptory charge, yet as we have brought up all the evidence on this writ of error we were entitled to a reversal of the judgment if that evidence did show, without contradiction, that the deed of trust was accepted by some of the preferred creditors without notice of fraud.

We fail to see that the number of facts the Judge has to determine in order to arrive at the conclusion that a verdict should go for one party or the other, can affect the question if the evidence is all on one side as to these facts. We were not asking a charge in our favor upon disputed facts, and had as well requested the Court to direct a verdict for plaintiff without setting out the reasons for the request. In the case of Armour vs. Hahn, *supra*, the Court had to find several facts before reaching the conclusion that the judgment should be for the defendant, and yet this court held that judgment should have been thus rendered on a demurrer to the evidence. And in the Texas case of King vs. Estill, 75 Tex., 484, in order to reach a verdict for the plaintiff the jury would have had to find seven different facts in his favor, and yet the court held that the Judge should have directed such a verdict, thus compelling him to find these facts himself. In that case no request was made for a peremptory charge in favor of the plaintiff, yet the special charges asked called attention to the important matters embraced in them, and on the case made by the evidence it was held that the Court should have instructed a verdict for plaintiff.

This holding is approved in Texas Pacific Ry. Co. vs. Patton, and made the basis of the decision. It seems therefore that even if our peremptory instruction should not have been given it was sufficient to call the attention of the Court to the fact

that there was no evidence to prevent a recovery for the plaintiff, and he should have so instructed.

The error of the Circuit Court of Appeals on this question is made the subject of the 22d assignment of error. (Rec., pp. 280, 281.) We also claim that that court erred in holding that the only question submitted to its decision on the appeal was as to the refusal by the trial court of the peremptory charge. We respectfully submit that all the assignments of error relied on in this court were urged before the Circuit Court of Appeals. We have already considered several of them, arising under the giving and refusal of instructions. We now proceed to such as relate to rulings upon the evidence.

It will be seen by reference to our ninth assignment of error that the Court allowed the witness Werner to testify as to interviews between himself, Seinsheimer and Freiberg, in which the latter stated that after they got a settlement they would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that it was obliged to fail. This related to matters occurring after the deed of trust was made, and was incompetent to affect their interests. (Id., 269.) There was no proof of any conspiracy between the makers of the deed and the preferred creditors, or any of them, or of the trustee, to defraud the other creditors of Freiberg, Klein & Co., and no such declaration made by any of the firm which had parted with the possession of the property could be admitted in evidence.

Winchester & Partridge Co. vs. Creary, 113 U. S., 101.

Jackson vs. Hardy, 70 Texas, 415.

The eleventh assignment of error questions the action of the trial court in allowing the witness Gorse to state as to rumors in Galveston in the year 1892 that Freiberg, Klein &

Co. were insolvent, he having refused to state when cross-examined the names of the persons from whom he heard these rumors, or give particular facts. (Id., 271, 272.) The evidence shows that the only fact relied on by the defense to show that the accepting creditors were put upon inquiry as to fraud in the deed of trust was the rumor alleged to be current in Galveston in 1892 that Freiberg, Klein & Co. were insolvent. If, in the view of the Court, such a rumor could cause this inquiry, then the plaintiff was entitled to know when and where and from whom the witness heard it, so as to test his credibility, and to know the exact character of the rumor by questioning the parties from whom the witness purported to derive his information, and his refusal to give their names should have excluded the testimony.

To sum up our argument in this case, we submit to the Court:

1. The deed of trust was valid on its face.

In addition to the authorities already cited upon this point, we cite:

Simon vs. McDonald, 20 S. W. Rep., 52.

Willis vs. Thompson, 85 Texas, 301.

2. All the debts secured in the deed were *bona fide*, and the deed was duly accepted by a portion of the secured creditors before levy of the attachment, and these facts were established by uncontroverted testimony.

3. Neither these creditors nor the trustee participated in the fraudulent intent of the deed, if such existed, or had any knowledge of it, at the time they accepted its provisions. Such being the case, and their debts being *bona fide*, they were not affected by such fraud. This is the law, whether the property mortgaged was in value exceeding the debts secured or not, but the case is much stronger for its applica-

tion when as here it was not enough to pay the preferred debts and the expenses of the trust. This is not only the law of Texas, but is supported by the authorities of other states.

Coblie on Mortgages, Sec. 771.

Eureka Steel Works vs. Breonahan, 33 N. W. Rep., 834.

Adams vs. Neiman, 46 Mich., 135.

4. Even upon the theory that a fraudulent deed of trust preferring creditors is invalid, if the preferred creditors were in possession of any fact that put them upon inquiry as to such fraud, which inquiry, if reasonably pursued, would have led up to a knowledge of the fraud, the present deed is valid, not a particle of evidence having been introduced to show that the trustee or preferred creditors were put on such inquiry; or, if they were, that the inquiry would have led to any discovery of fraud. The only circumstances relied on to put upon inquiry were rumors of insolvency, and insolvency itself would not have affected the deed. The burden of proof as to notice is upon the defendants in all cases when notice is relied on to vitiate a transaction.

Wofford vs. Farmer, 40 S. W. Rep., 738; approved by Supreme Court in 40 S. W. Rep., 788.

5. The goods in controversy being in the possession of the trustee under a deed of trust—valid and in force as to accepting *bona fide* creditors who were not tainted with any fraud in its execution—the seizure of these goods was in violation of the statutes of Texas, and a trespass for which the measure of damages was their value at the time and place of seizure; and no other verdict, except for such value, was allowable under the pleadings and evidence in the case, and this was therefore the only matter to be submitted to the jury.

6. The foregoing propositions being correct in law and supported by uncontroverted evidence, it was the duty of the

trial Judge to enforce them by a charge to the jury which did not leave to them either the validity of the deed on its face or its acceptance by preferred creditors; or notice of fraud to such creditors; or the fact of the levy of the attachment; or the measure of damages prescribed by law; but only the amount of damages according to such measure; two of these matters being questions of law for the court, and the other three proven by unimpeached and uncontroverted evidence.

7. The Court should have given the instructions set forth in the sixteenth assignment of error (Rec., p. 275); also, in bill of exceptions (Rec., p. 81), to the effect that the fraud of an endorser would not affect the right of the owner of the claim who had no notice of it.

8. We further claim that a question should not have been left to the jury where the evidence raised no issue as to it, such as the acceptance of the deed; or when the finding upon it, either one way or the other, should not have influenced the verdict, such as notice of the insolvency of the makers of the deed.

9. We claim also that as upon the whole evidence the plaintiff was entitled to a verdict for damages, and a peremptory charge to that effect was asked by the plaintiff, it was the duty of the trial Judge to so charge, and that failing to do so we are entitled to a reversal if the evidence is insufficient to support the verdict, whether we specially excepted to the evidence or not, the charge asked having called the attention of the Court to the insufficiency of the testimony.

Texas & Pacific Ry Co. vs. Patten, 61 Fed. R., 259, 267.

As said in that case: "The request for that charge in effect, asked the Court to direct a verdict for the 'plaintiff,' and 'the hypothesis as to the proof made in the requested

charge only embraced matters of fact, about which there was no dispute.' "

We respectfully submit that the judgments of the trial court and of the Circuit Court of Appeals are erroneous upon each and every ground set forth herein, and respectfully ask that they be reversed.

A. H. Willis,

*Attorney for Plaintiff in Error.*

No. 286. 45. Com on
Brief of Hume for D. C

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 15, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

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ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MOTION TO DISMISS WRIT OF ERROR, WITH BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR IN SUPPORT THEREOF.

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F. CHARLES HUME,
Counsel for Defendants in Error.

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Clarke & Courts, Manufacturing Stationers, Galveston.

*Filed the* ..... *day of* ..... 189....

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Clerk Supreme Court.

No. 286.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v.} ON MOTION TO DISMISS WRIT OF ERROR.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

*To the Honorable the Supreme Court:*

The defendants in error respectfully move the court to dismiss said writ of error; for that the judgment of the Circuit Court of Appeals in said case is final, and this court is without jurisdiction to review it upon said writ. They show—

That the action was brought in the trial court by the plaintiff, Jacob Sonnentheil, a citizen of the State of

Texas, against the defendant, The Christian Moerlein Brewing Company, a citizen of the State of Ohio, and the defendant J. J. Dickerson, a citizen of the State of Texas, to recover of "the said defendants" damages alleged to have been suffered by the plaintiff from the seizure and taking of his goods by said Dickerson under and by virtue of a writ of attachment issued out of said court in a certain suit there pending between said Brewing Company and third parties—the said Dickerson then and there being and acting as the marshal of said court, "and being thereto directed and induced by the said The Christian Moerlein Brewing Company."

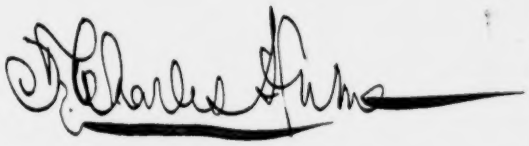
That the citations to said defendants commanded them to appear and answer the plaintiff's petition, "in an action of damages for wrongfully suing out attachment."

That no instruction to the jury, whether given or refused, was predicated upon the liability of the defendants severally, or otherwise than as joint wrongdoers, and the verdict found by the jury and the judgment rendered thereon by the court were for the defendants.

That the judgment of the trial court was affirmed, and a rehearing denied to the plaintiff in error, by the Circuit Court of Appeals.

Wherefore they say that, in respect of the right of the plaintiff in error to have it reviewed in this court upon writ of error, the case is within the terms, meaning and intent of sec. 6 of the Act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals, providing that judgments of the said courts shall be final in

all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States.



Counsel for Defendants in Error.

No. 286.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v. } STATEMENT AND ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

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STATEMENT.

The petition of the plaintiff below, plaintiff in error in the Circuit Court of Appeals and here, filed January 25, 1893, was thus:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, SITTING AT GALVESTON.

JACOB SONNENTHEIL
v.
J. J. DICKERSON AND OTHERS. } No. 1702.

*To the Honorable the Above-Named Court:*

The petition of Jacob Sonnentheil, who resides in the county of Galveston, and State of Texas, and who is a citizen of said

State, plaintiff, against The Christian Moerlein Brewing Company, a corporation created by and existing under the laws of the State of Ohio, and a citizen of said State of Ohio, where also it has its domicile in Hamilton County, and of J. J. Dickerson, who is a citizen of the State of Texas, and resides in the county of Lamar, in said State, defendants, respectfully shows:

That heretofore, to wit: on the 23d day of December, 1892, your petitioner was the lawful owner and possessor of, and had good title to a large stock of goods, wares and merchandise, store fixtures, tools, implements, horses, mules, wagons and trucks, and harness and other personal property in the county of Galveston, all of which said property was then and there of the reasonable value of eighty-four thousand two hundred and seventy-three dollars and five cents ($84,273.05).

That on or about the said 23d day of December, 1892, the said J. J. Dickerson then and there being the marshal of this honorable court, and then and there acting as such by and through his deputy John H. Whalen, and under a certain writ of attachment issued out of this honorable court in a certain suit therein pending and wherein the said The Christian Moerlein Brewing Company was plaintiff and Moses Freiberg, and Samuel Klein and Joseph Seinscheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co., were defendants, and being thereto directed and induced by the said The Christian Moerlein Brewing Company, forcibly seized and took all of the said property from the possession of your petitioner and without paying him any portion of the value thereof in any way. That by reason of the premises your petitioner has been damaged in the sum of one hundred thousand dollars.

That the said The Christian Moerlein Brewing Company has an agent, agency and office and representative in the county of Galveston aforesaid, and that L. A. Grelling is the agent and representative of the said defendant The Christian Moerlein Brewing Company in and for said county of Galveston, where the said L. A. Grelling resides.

Wherefore petitioner prays for citation against the said defendants as in like cases is by law provided, and that upon hearing he have judgment against the said defendants for his damages aforesaid, with interest and costs, and for such other and further legal relief as he may be entitled to. R., 2–3.

The citations to the respective defendants were identical in terms—commanding them, severally, to appear and answer the plaintiff's petition, "in an action of damages for wrongfully *suing out* attachment." R., 4, 6.

There was no contention by the plaintiff that one defendant was liable if the other was not: no instruction to the jury was asked or given save upon the assumption that both defendants were liable if either was, and that the act for which Dickerson's liability was alleged was directed and induced by his co-defendant. R., 2, 226–235.

The verdict and judgment in the trial court for the defendants was approved, and motion for rehearing denied, by the Circuit Court of Appeals. R., 259–260.

The petition to this court for writ of error avers that the judgment complained of is not final, for the reason—

> That said cause is not one in which the jurisdiction of the said Circuit Court or of said Circuit Court of Appeals depended entirely upon the diverse citizenship of the parties thereto; but that the plaintiff and one of the defendants, to wit, J. J. Dickerson, were at the time of the institution of said suit citizens of the same State, namely, the State of Texas, and jurisdiction of said courts as to him depended upon the fact that the said Dickerson was at the date of the trespasses and wrongs complained of by the plaintiff in said cause, United States marshal; and was sued for an alleged trespass committed by him, as such marshal, in seizing the property of said plaintiff under an attachment writ in his hands, as said marshal, sued out in said Circuit Court against the property of the firm of Freiberg, Klein & Co., the defendants in said attachment suit; and the said Dickerson, by way of answer in said cause, justified said seizure under the authority of the writ directed to and held by him as United States marshal and executed by him as such by levying upon and seizing said property. R., 264.

## *PROPOSITION AND ARGUMENT OF THE DEFENDANTS IN ERROR.*

The judgment of the Circuit Court of Appeals is final, not less in the case, as here, where as to one only of two defendants sued for a joint tort jurisdiction depends entirely on the fact that that defendant and the plaintiff are citizens of different States, than in the case where as to a sole defendant jurisdiction depends entirely on the fact that such defendant and the plaintiff are citizens of different States.

Or, stated in other terms: The judgment of the Circuit Court of Appeals is final, unless as to *all* parties there is jurisdiction upon a ground *other than* (though as to some it may be *additional to*) that of diverse citizenship.

We are not aware that the question of the finality of a judgment of a Court of Civil Appeals in a case like this, has ever been decided by, or presented to, this court.

*Colorado Mining Company v. Turck*, 150 U. S., 138, affirms the finality of a judgment of a Circuit Court of Appeals where the opposite parties consisted of a *sole* plaintiff and a *sole* defendant, and jurisdiction of the Circuit Court was invoked on the single ground of adverse citizenship, although another ground of jurisdiction subsequently developed. It was there said:

**If the plaintiff had invoked it (jurisdiction) on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented. 144.**

Assuming that in the case suggested by the court the judgment of the Circuit Court of Appeals would not be final, we maintain that similar conditions must exist to deprive a judgment of that court of finality in a case where, instead of a single party on each side, there are two or more parties on one side or on each side. If it be true that as between a sole plaintiff and a sole defendant of diverse citizenship there can be no review by this court of the judgment of the Circuit Court of Appeals unless the jurisdiction of the Circuit Court was invoked upon a ground other than and additional to that of diverse citizenship, it should seem to be equally true that no such review can be had where there are two or more parties on one side, or on each side, as to some of whom there was jurisdiction in the Circuit Court only upon a ground or grounds other than diverse citizenship, and as to the others there was jurisdiction, because of diverse citizenship, unless as to such others there was *also* jurisdiction upon a ground or grounds other than diverse citizenship.

There is here but a single action for damages for a joint tort of two defendants. Both are liable or neither is. In that form, and in that only, the plaintiff pleads and seeks judgment. But for the diverse citizenship of the plaintiff and the Christian Moerlein Brewing Company there would have been no jurisdiction of the *one*

action against the *two* defendants to recover damages *in solido* for the single trespass committed by the one under the direction of the other.

Counsel for Defendants in Error.

No. 245.

APR 1 1898
JAMES H. McKENNEY,
CLERK

Brief of Hume for D. C.

No. 245.

Filed April 1, 1898.

# Supreme Court of the United States,

OCTOBER TERM, 1897.

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JACOB SONNENTHEIL

v.

CHRISTIAN MOERLEIN BREWING CO. ET AL.

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## BRIEF FOR DEFENDANTS IN ERROR

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WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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F. CHARLES HUME,
Counsel for Defendants in Error.

Clarke & Courts, Manufacturing Stationers, Galveston.

No. 286.

# Supreme Court of the United States.

OCTORER TERM, 1897.

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JACOB SONNENTHEIL

v.

CHRISTIAN MOERLEIN BREWING CO. ET AL.

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## BRIEF FOR DEFENDANTS IN ERROR.

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WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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For clearness and accuracy we prefer the following

### STATEMENT OF THE CASE.

Prior to December 16, 1892, Moses Freiberg, Sam Klein and Jos. Seinsheimer, under the firm name of Freiberg, Klein & Co., conducted a wholesale liquor and cigar business at Galveston, Texas. In February, 1891, it was discovered by Moses Freiberg that the firm had been defrauded of considerable sums of money by

Seinsheimer and was in an embarrassed condition. The largest creditor of the firm was a kinsman of Moses Freiberg, the senior member of the firm, and a settlement was effected with him whereby he scaled his debt materially and took in payment of the balance, besides some cash which the members of the firm contributed from their private means, whiskies out of the firm's stock of goods. With this diminution of their indebtedness the firm hoped to overcome its embarrassment, but after a couple of months this hope was disappointed, the firm being unable to meet its obligations, and a meeting was called at the residence of L. Fellman, in Galveston, and attended by the members of the firm, L. Fellman, H. Kempner, and Mr. Grumbach, who had indorsed for the firm.

Seinsheimer and Grumbach married sisters, and are sons-in-law of L. Fellman. Kempner married the sister, and is the brother-in-law of Seinsheimer. At the time of this meeting Fellman & Grumbach, who were partners in the dry goods business, were indorsers for Freiberg, Klein & Co. to the extent of some $135,000. The condition of the firm was fully disclosed at this meeting and it was concluded that in view of Fellman's financial condition, he being a large indorser for the firm as well as for other relatives, that the failure of the firm at that time would result in his financial ruin. Fellman was "not ready" for the firm's failure. It was further determined that Freiberg should go to Cincinnati for the purpose of inducing some of his kinspeople in that city to assume the

Fellman & Grumbach indorsements; but in the meantime, if occasion should require it, Fellman was to be protected, "come what may."

Upon Freiburg's return from Cincinnati another meeting of the same parties was held at Grumbach's residence in Galveston, and Freiberg reported to them that his mission had failed and it was then resolved by and between all the parties that the firm should go on in business in the ultimate hope that it might "pull through," but for the primary purpose of keeping on hand, by purchase, a sufficient stock of goods to protect Fellman, who was the capitalist in the concern of Fellman & Grumbach, and whenever he should indicate that he was ready for Freiberg, Klein & Co. to fail and by the method of such failure to save enough of the assets of the firm to enable it to continue in business under Fellman's or some other assumed name until its creditors could be forced or persuaded into some compromise advantageous to the firm. The agreement entered into was reciprocal. Fellman was to be protected by the firm to the extent of his indorsements and, in turn, by the use of his name and money the firm was not to lose its interest in the stock or any assets of the firm, but upon settlement with the creditors the stock and assets were to revert to the firm. (R., 187–195.)

In pursuance of this conspiracy, in March, 1891, a request for a report of the financial condition of the firm by Dun's Commercial Agency was answered by a false statement made under the direction of Joe Seinsheimer

(R., 203, 208), showing that the assets of the firm exceeded its liabilities by $200,000, when in truth the firm was insolvent. (R., 201.)

The business of the firm was continued by the purchase and sale of goods, and the Fellman indorsements were continued by extensions and renewals.

In February, 1892, upon striking the annual trial balance it was discovered that the affairs of the firm had drifted from bad to worse and that its further continuance was more than hazardous. Its absolute insolvency was indisputable. The call of the commercial agencies for the annual report was again met by an absolutely false statement, showing assets in excess of liabilities of more than $200,000. (R., 200, 206.) Of all these matters, Fellman, Grumbach and Kempner had full notice, being thereof advised directly by the members of the firm. In the summer of 1892 the early failure of the firm became evident, and goods were purchased and placed in the stock with a knowledge that they could not be paid for. The firm's credits were restricted, and in many instances entirely cut off, and rumors of its insolvency circulated throughout the community. The failing condition of the firm was a matter of discussion among merchants and bankers in the city of Galveston, and inquiries concerning the firm's solvency from abroad were made of the local commercial agencies. (R., 187–194, 206–7.)

A demand of the Commercial Agency, in September, 1892, made at the instance of the Christian Moerlein Brewing Company, one of the defendants in error in this

case, was answered by a false statement showing an excess of $200,000 over all liabilities, and the Brewing Company was thereby betrayed to extend further credit and sell its merchandise to the firm on the usual commercial credit. (R., 199, 210.) It was now evident that the firm would not be able to meet its obligations already incurred, and that it never intended to pay for goods it was daily buying from others. During the months of September, October and November, and up to the 16th day of December, 1892, the day of its failure, the firm made large credit purchases, and early in December, believing that the time for a profitable failure to itself and Fellman had arrived, Fellman, who was then in New York, was called home by telegraph to participate in, guide and manipulate the enterprise. He came immediately, and assumed practical superintendence of affairs. Upon consultation with attorneys, he had the original purpose of the firm, to transfer its property to him directly, changed to a mortgage in favor of the creditors whose paper he indorsed, thus more effectually covering the excessive value of the property to be transferred and placed beyond the reach of creditors. He next employed a trustee, and found, for the salary of $150 per month, a person suitable to his purpose in the plaintiff in error in this case, who is related to him by marriage, and utterly without any knowledge of or experience in the particular business for which he was selected. (R., 111–2, 117–8.) These preliminaries being accomplished, a deed of trust was executed by the firm to Jacob Sonnentheil, the

plaintiff in error, as trustee, to secure home creditors and two who were not home creditors, already secured, save in few and relatively unimportant instances, by the indorsements of Fellman & Grumbach.

The property conveyed by the trust deed exceeded in value the secured debts by about seventy-five thousand dollars (R., 194), and, in accordance with the treaty of reciprocity between the firm and Fellman, was to be purchased by the latter from the trustee and then turned over to the firm under the guise of Fellman's name, and thus be placed beyond the reach of other creditors. (R., 192-3.) That such was the mutual understanding is confirmed by a conversation had between Fellman and Moses Freiberg, senior member of the firm, a few days before the failure, in which Freiberg was assured, by way of consolation, that as soon as Fellman got the stock of goods the firm could run the business under his name (R., 192); and also by a conversation between Werner, agent of the Moerlein Brewing Company, and Moses Freiberg, senior member of the firm, a day or two after the failure. (R., 211.)

Direct proof shows that Kempner, president of the Island City Savings Bank of Galveston, a beneficiary under the deed of trust to the extent of $29,500, secured by the indorsement of Fellman & Grumbach, was fully apprised and actively assisted by his advice and presence in the scheme of keeping the stock filled up at the expense of innocent creditors to protect Fellman's indorsements. The First National Bank of Galveston was fully

apprised of Freiberg, Klein & Co.'s shaky condition through its cashier, W. N. Stowe. The testimony of the witnesses, Freiberg (R., 191), Stowe (R., 220–1), Gorse (R., 206–7), and Werner (R., 210–12), amply shows the general serious and substantial rumors and information in all the trade centers of the Union of the firm's failing condition, thus furnishing ample basis for inquiry to all people who were not betrayed or cheated by the false declarations of the promoters of the fraud.

Two deeds of trust were executed by Freiberg, Klein & Co. to Jacob Sonnenthiel. The first was delivered in the evening of December 16, 1892, and while in the possession of the trustee, and before its registry, in the presence of the trustee, Fellman and Joe Seinsheimer, one of the grantors, a material change was made therein by interlineation, by which it was made to convey property not mentioned therein at the time of its execution by the three members of the firm. Thereupon this deed was delivered to the proper officer and duly registered. From this instrument, prior to its signature, there was eliminated by erasure a power authorizing the trustee to adjust, compound, compromise and settle or sell, transfer and assign, such of the debts or demands of the grantors as might be in dispute or in doubt or of a doubtful nature, upon such terms as in the exercise of a sound discretion might seem to him most advantageous. (R., 121.)

A day or two later, on a Sunday, a second deed of trust was executed, after some opposition of one of the members of the firm of Frieberg, Klein & Co., by which

the erased power in the first instrument was restored and a further power added, by which each member of the firm conferred upon the other full power to execute all such further instruments, assignments and assurances of title as might in the opinion of counsel be requisite to facilitate and expedite the execution of the trust by Sonnentheil. This deed of trust was never recorded or registered, and no one had any knowledge thereof save the trustee and its makers and their counsel. (R., 128-9, 222-3, 234-5.) By neither deed of trust is the value of property conveyed disclosed, nor is it named or specified by itemized schedule, and the trustee is not required to sell the property conveyed to him for cash, but simply to sell the same as speedily as possible in parcels or as an entirety, at public or private sale, and to collect, adjust, compromise or sell at private or public sale all debts and claims. (R., 119-127.)

The possession of the trustee consisted of his having the key to the storehouse in which the goods were situated, and in attending at the store some hours every day. He signed all the letters and all checks, and kept control of the general cash. The three members of the firm were each employed at a salary of $300 per month, Seinsheimer as correspondent, and he also had the keeping of the daily cash receipts, and the other two as collectors. All the employes of the firm, including the drummers, were retained in their respective positions, and at their former salaries. The firm's sign, prominently displayed over the door of the storehouse, was not re-

moved. (R., 115-6, 109.) The business (exclusive of the purchase of goods), with the consent of the beneficiaries, was conducted in the usual way by selling in small parcels, sometimes on credit and sometimes for cash, to the regular customers of the firm. Such customers consisted largely of barrooms throughout the State of Texas, and the purpose of the trustee was in accordance with the wish of the beneficiaries to keep these barrooms going in the usual way by selling them goods on time, so as not to interrupt their usual business, and gradually collect what they owed. (Read testimony of B. Adoue, R., 152; and of Lasker, R., 146-7; and of Levi, R., 224; and of Sonnentheil, R., 141-2.)

The books of the firm, the trustee claimed, were in his charge, but he admitted that all entries made in the books after the date of the failure were made therein by Mr. Joe Seinsheimer, and not under his (the trustee's) direction, but in his capacity as a member of the firm. In fact he claimed to be utterly ignorant of such entries, although they showed that the books had been regularly kept just as though no change had been made in the ownership of the property. From these entries it appeared that a sum amounting to some $2400, which, according to the cash book, should have been on hand, was balanced after the failure by a profit and loss entry under most suspicious circumstances, the dates of the entry both in the cash book and ledger having been erased. The trustee claimed that he kept the firm books simply to ascertain the property belonging to the trust, and

though he knew these books were being kept for the benefit of the firm in the usual way, he did not concern himself about them. It also appeared that, at least in one instance, some months after the failure, Seinsheimer had collected a debt due the firm and receipted therefor in the name of the firm without accounting for the money. There was no outward visible change in the management of the business, except that the trustee was there at times during the day. When the agent of the Christian Moerlein Brewing Company called at the place of business after the failure to inquire about the claim of the company, amounting to nearly $30,000, he was met by the senior member of the firm, who requested that the beer agency be left with him, and that as soon as his firm got a settlement with the Brewing Company, the agency not having changed hands, its business would go right on with the same customers. (R., 211.)

It does not appear from the testimony of any of the beneficiaries that they accepted the deed of trust with a view of binding themselves in such a manner as to preclude themselves from resorting to any other method of realizing their claims in case an opportunity was offered to do so. They were willing to take whatever might be realized under the deed of trust, without releasing their indorsements or an opportunity to make their money out of other property in the event any could be found. See testimony of Lasker (R., 146, 149), Fly (R., 151), Adoue (R., 152), Marx (R., 155–6.)

All of the beneficiaries except Adoue & Lobit, who held a claim of $15,000, secured to the extent of $10,000 by the indorsements of Fellman & Grumbach, have been paid in part by the trustee out of assets held by him under the deeds of trust, and which were not seized by the marshal, and in part by the indorsers. The trustee paid in full the claims of the beneficiaries B. Kahn, A. W. Fly, and the Island City Savings Bank, and partially paid the First National Bank of Galveston. The claims so paid by the trustee aggregated $48,206.73. (R., 117.) The balance due the First National Bank was paid to it by Fellman & Grumbach. (R., 220.) The claims of the American National Bank, Citizens Loan Co., Mr. Ketch, Mrs. Lowenstein, S. A. Walker and the Irwin National Bank were all paid by Fellman & Grumbach after the attachment. (R., 145, 220, 225.) The trustee collected out of the assets not seized by the marshal some $73,000. (R., 144.) In another place his collections, as stated, aggregated $98,020.20. (R., 117.) The part of this amount paid by the trustee to some of the beneficiaries who had actual knowledge of the fraudulent purpose of Freiberg, Klein & Co. would have been more than sufficient to have paid the claim of Adoue & Lobit.

The Christian Moerlein Brewing Company had been doing business with Freiberg, Klein & Co. for some years, and at the time of the failure they owed the company some $28,000 for merchandise delivered to them during the last three or four months. On the 23d of December, six days after the failure, the Brewing Com-

pany filed its suit against Freiberg, Klein & Co. in the Circuit Court of the United States at Galveston for the amount of its claim, and procured the levy of a writ of attachment upon the stock of merchandise for which plaintiff in error sues in this case. Following the attachment of the Brewing Company, other attachments were levied, and the entire stock was sold, realizing $51,258.16, which was placed by the marshal in the registry of the court, and, after deducting expenses, applied to the payment of the various attachment creditors. (R., 106.)

Plaintiff in error, Jacob Sonnentheil, filed three suits to recover the value of the stock of goods so seized and sold, viz: One against the United States marshal and the Christian Moerlein Brewing Company, being the case at bar, and two in the State District Court at Galveston against various sureties on the indemnity bonds given by the various attaching creditors to the United States marshal. (R., 117.) One of the cases in the State District Court was tried prior to the case at bar and resulted in a verdict and judgment for the defendants, but on appeal was reversed by the Court of Civil Appeals of the First Supreme Judicial District of the State of Texas, on account of error in the charge of the trial court. Sonnentheil v. Guaranty and Trust Company, 30 S. W. Rep., 945; 10 Civ. App., 274.

The case at bar went to trial in the court below on the 30th day of October, 1895, and resulted in a verdict and judgment for the defendants on the 13th day of Novem-

ber, 1895. Plaintiff in error filed his motion for a new trial, in which the same grounds now relied on for a reversal were urged before the trial judge for a new trial. On the 14th day of November, 1895, the court overruled the motion, holding that the evidence justified the verdict.

Thereupon the plaintiff in error removed the case, by writ of error, to the United Circuit Court of Appeals, assigning twenty several errors, for all and each of which he asked that the judgment of the trial court be reversed and the case remanded (R. 237-259). The case was submitted to said Circuit Court of Appeals upon briefs and arguments of counsel for both parties, May 25, 1896, and on June 9, next thereafter, that court rendered judgment affirming the judgment of the circuit court (R. 259), and filed its opinion (R. 283-5). In pursuance of the court's order granting leave therefor, the plaintiff in error by counsel, filed his petition for rehearing, June 19, 1896, complaining that the court had treated the case as if the only error assigned and urged was the failure of the trial court to give the requested peremptory charge for the plaintiff (recited in the twelfth assignment, R. 244-5), whereas numerous other indicated errors, presented by the thirteenth, eleventh, fourteenth, first, second, third, fourth, eighteenth, nineteenth and twentieth assignments, were insisted on (R. 259-262). The rehearing was denied by the court, November 24, 1896 (R. 263). The case is here by writ of error, allowed by a Justice of this court, filed in the Circuit Court of Appeals on

December 29, 1896 (R. 286), and upon an assignment of twenty-three errors—the first twenty being imputed alike to the trial court and the Circuit Court of Appeals, and identical in number, order and terms with those assigned in the court last named (R. 265-280, 237-252). The last three errors assigned are ascribed to the Circuit Court of Appeals alone, and are, in substance, hereinafter stated.

## *BRIEF OF ARGUMENT.*

If we do not misapprehend the real contentions presented in the brief of the plaintiff in error, they do not affirm that the evidence was incompetent or insufficient to sustain, substantially, the defense of fraud as against the makers of the trust deed and Fellman; or that evidence, if otherwise competent, of facts or circumstances preceding, attending, involved in, or following the main facts alleged to be fraudulent, is not admissible to establish such fact; or that acceptance by or for any creditor was shown otherwise than by the testimony of Fly, Adoue, Marx and Lasker; or that such acceptance should avail in behalf of such creditor if accompanied by knowledge of the fraud charged, or of any circumstances calculated to provoke inquiry with respect thereto. Therefore, it is believed to be neither necessary nor useful to traverse in detail all the formal propositions of the brief; or to conform to the order in which they are advanced; although in addressing ourselves to what we consider to be the issues *relied on* by the plaintiff in error for reversal of the judgment, we may, in the interest of lucid demonstration, be led to notice parts of the record which relate chiefly to immaterial or uncontrolling contentions.

*FIRST.*

Even upon concession that the trial court was right in assuming that the fraudulent intent, if shown, of the makers of the trust deeds was not of itself sufficient to defeat the action, if any one of the beneficiaries had—in the legal sense, and without such notice or means of notice of that intent as would render his act ineffective—"accepted;" yet, the court was fully warranted in submitting to the jury the alternative: "But, on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant." (R. 233).

It is patent that an appellate court can find no such "coigne of vantage" for determining the real nature and merits of a controversy as that secured by an intelligent trial court by personal and immediate contact with it in all its forms—and especially by observation of the language, manner and situation of witnesses, where its decision turns on issues of fact.

Fresh from perfect opportunity of observation and knowledge of the case, the trial court refused a peremptory instruction for the plaintiff, predicated upon the assumption that—

The deed of trust in question in this case *is valid upon its face*, and the debts secured therein are shown to have been, at the time of its execution, the bona fide debts of the makers, Freiberg, Klein & Co. *It has been further shown*, that some of the creditors named therein *accepted* said deed before the levy of the attachment of the Moerlein Brewing Company, and *it has not been shown* that at the time of such acceptance such creditors had

*knowledge* of any fraudulent intent in the making of such deed, or had *any cause to suspect* that the same was made with fraudulent intent. (R., 244.)

Indeed, the court, *inter alia*, instructed thus:

In order to set aside an instrument executed by one party to secure the just debts to another party, in order to avoid that instrument it is necessary that the evidence should show that the party making the instrument was guilty of fraud himself, and the party in whose favor it was made either had *actual knowledge* of the fraudulent intent, or from *the circumstances surrounding the transaction and the evidence taken as a whole*, would show and indicate that he know the fraudulent intent, or that he was *possessed of information which would put a reasonably prudent person upon inquiry, and if that inquiry had been properly followed it would have led to the knowledge* that the instrument was fraudulent. In other words, where a party that is insolvent or in a failing condition, under the laws he has a right to prefer creditors; he has a right to pay one creditor in preference to another if he sees proper to do so, and in doing that, in order to avoid the instrument upon the ground of fraud, the jury must believe from the testimony that the party making the instrument was guilty of fraud himself, and the party receiving the benefit of it either was *a party* to the fraud, or he was *possessed of information* (and by information I do not mean direct testimony, *I mean circumstances surrounding the transaction*) *that would indicate to the mind of a reasonably prudent person that there was fraud in the transaction.*

The natural effect of the instrument given that prefers certain creditors is to hinder and delay other creditors; that is the natural effect of it, but that is not the effect that avoids it; it requires *more* than that; it requires that the party in making the instrument had an intention not only to prefer this debt in fact, but he intended to acquire some *ulterior benefits to himself;* he might intend to *convey a large amount of property to a trustee with intent of having it sold in bulk for less than its value, and buy it in in some other person's name for his benefit.* And he might have reasons by which he might buy this property in bulk and hold it in the name of some other party, so he could reap an interest or benefit from it; he might have some other fraudulent intention, and *some other in-*

*tention*, must exist than the mere effect—that is, hindering and delaying other creditors. (R., 231.) * * * *

If you *don't* believe these creditors *accepted*, or any of them, *before the attachment was levied*, you will return a general verdict for the defendant, but *if you find* some of the creditors, or any of them *did*, before the attachment, *then* you are to inquire into the question whether fraud existed or not.

*If you find* no accepting creditor was free from this fraud, in fact, or was free from *that information in regard to the surroundings* that would have put a reasonably prudent person upon inquiry, then, no matter *whether they accepted or not*, you would give a verdict for the defendants. In determining this matter, I would expect you to be *guided by the law* I give you. I never invade the province of the jury; that is what you are here for—the *disputed* questions of *fact; you* are the judges of the *weight of the evidence and the credibility of the witnesses*, and thus being the judges, you are to determine *who has told the truth and who has not;* and in doing that, you have the right to take into consideration the *interest of the parties;* you have the right to take into consideration the *manner of the witnesses on the stand;* in fact, you have the right to *exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there*, but do what you think is right and just *under the law.* * * * * *

In determining the question of fraud, you have the right to look to the fact that *most of the parties lived in Galveston*, two living at a distance, and some of them *represented here in Galveston;* and you have the right to look to the *relations of the parties, and all the circumstances surrounding them*, in order to determine the question of whether there was fraud or was not fraud, and whether or not the *accepting creditors, if there were any, knew* of it or of *facts that would have put a reasonably prudent person on inquiry.* (R., 233-4.)

Under these instructions the jury returned a verdict, and the court rendered a judgment for the defendants, and there was no exception *then* taken to the action of either jury or court. A bill reciting the taking of such exception—because there was no evidence to justify either

the verdict or the judgment--was tendered to the trial judge for allowance, but he "qualified" it by saying that no exception was taken *at the time*, although on motion for new trial his attention was called "to the grounds *therein* stated" and exception taken to his ruling (on the motion), which he considered as, at once, an exception to that ruling and to the verdict and judgment, in that said verdict and judgment were each "*contrary* to the evidence and to the *law* arising therefrom." (R., 235-6.)

We pause at this place to observe and insist that the recitations in this bill as contradicted, or "qualified," do *not* show that *at the time of the rendition of verdict and judgment* exception was taken to either *in any form whatsoever;* and that there is no authorized assignment here presenting or justifying the consideration of error in either verdict or judgment.

The court below could not unite in the same instant of time the occasion of the rendition of verdict and judgment and the occasion—separated from the first by a day—of the hearing and disposition of the motion for new trial (R., 236, 103); nor by "considering" an exception to the judgment rendered on such *motion* as an exception to the *verdict and judgment*, could it be made so —certainly not in any such sense as to be available on assignment here.

Not only did the court manifest by its own instructions, and by refusing the instruction requested by the plaintiff, that the issue of the actual or constructive notice to the alleged accepting creditors of the fraudulent

intent—and not less the issue of acceptance—were, *on the facts, disputed, and therefore for the jury's determination;* but in refusing the motion for new trial, showed that renewed argument and subsequent reflection had not only left unchanged its conviction that evidence had been presented of such character and force as to require its submission to the jury, but had lead to the conclusion that the verdict on that evidence was too well supported to be reversed by judgment granting the motion.

The long extended history of the dishonest scheme, and the varied and crooked expedients by which it was promoted and maintained; the beneficial results that were to accrue to all the parties and privies, to the exclusion of distant creditors whose trust was betrayed and whose property was appropriated for the aggrandizement or protection of others; the persons, the manners, the self-serving testimony of witnesses interested to retain and to affirm the justice of benefits already secured, directly or indirectly, from the impeached transactions, or of witnesses seeing their way to secure such benefits should the impeachment fail—all these, glowing with the colors of life, and in one sense, and despite disguise, with the colors of truth, as well, were submitted to the cognition of court and jury.

Who better than they is qualified to determine what conclusion is warranted by all the facts, conditions, circumstances, revealments—whether unwilling or unconscious—which, together, constitute the evidence that

must be accepted as giving to the transactions impugned their true character?

Grant, if you will, that the very act and article of knowledge in law of the fraudulent intent are not fixed by direct, open and patent proof—

> "But yet, I say,
> If imputation and strong circumstances,
> Which lead directly to the door of truth,
> Will give you satisfaction, you may have it."

Our preliminary sketch of the history of the case is thought to reflect fully and faithfully the substance of the oral and paper evidence. Extracts from or reference to the testimony of some of the witnesses may serve, perhaps, to make a few facts clearer.

MOSES FREIBERG.

As to our firm being in condition, February 1, 1892, to continue business, buying goods and keeping its stock up without obvious peril to its creditors, *subsequent results of our business answer this question.* (R., 191.)

* * * * * * *

A very short time before our failure, Mr. Fellman took me to task for not coming to his store, where I used to go quite frequently. I told him I felt too badly about our affairs, and he asked me to step into Tiernan's place, where we sat down and talked it over. He told me that I was a fool to take the matter so to heart. Lots of people had failed before and lots more would fail hereafter. He furthermore said: "You need not worry. *After I buy you out you can run the business in my name until you get a settlement. If you can not raise money enough to make the settlement, I will see that you get the money to make the settlement with.*"

* * * * * *

I remember the signing and making of the second deed of trust to Mr. Sonnenthiel. It was made on *Sunday* morning following our failure. I came to the store on Sunday morning, and Mr. Seinsheimer told me Mr. Klein would arrive in a few moments from Dallas. I asked him what for, and he said the deed of trust *had two kinds of handwriting, and the lawyers thought it looked bad, and there might be some trouble.* (R., 192.)

* * * * * * *

After the trust deed was made, and *before* the goods were attached, I conversed with Mr. Fellman, and told him to buy the goods before there were any attachments levied. I thought there was danger of attachments being run. He said he was not able to buy. He could not make the financial arrangements. *I made the request because Mr. Fellman had promised me he would do so,* and also, as stated, because I was afraid that attachments would be run on the stock, and it appeared to me from the action (of) and conversation with Mr. Fellman that he courted and in a manner invited such attachments. * * * I requested Mr. Fellman to replevy the goods from the United States marshal *after* attachment had been levied upon them. *He answered, that it was as good a sale as he cared to make* I made the request, *because Mr. Fellman had promised me to let us continue the business in his name or some one's else until we would get a settlement.* I knew if the stock was not replevied there would be nothing to *continue the business, nothing to sell, and without stock to keep up the barrooms who owed us large amounts of money, I knew there would be a waste and slaughter of our assets,* as subsequent events have proved there was. I thought I had a right to demand the replevy of the stock, because *during all our conversations and all of our meetings and confabs it was always understood and agreed by Mr. Fellman the stock should not go out of our hands, come what may.* Our understanding was, that *we were not to loose our interest in the stock nor in any of the assets of the firm.* It was all to revert to *us when settlement was made.* * * *

We (Klein and Freiberg) showed him (Fellman) the necessity of replevying the stock so *we* could keep on supplying the saloons who owed *us* large sums of money, and who would and could not pay *us* unless *we* could so supply them, and he finally agreed to the replevying of the stock, and said he would try to make arrangements; but later he informed us he could not do it, and Mr. Son-

nentheil informed us he refused to replevy the stock. Finding our pleadings were of no avail, Mr. Klein and I called on Mr. Fellman at his rooms at the Tremont Hotel and *reminded* him that he had *promised* us that *we could continue the business, either in his name or in ours*, and that now there was *nothing to sell and nothing to make a settlement* with, and we demanded that he set aside the sum of $25,000 in the hands of some third party for the purpose of making a settlement with our creditors. The demand was for the sum of $25,000 to be set aside for the firm for the purpose of making a settlement with our creditors. *It was made, because it was promised to us that we should be furnished with the means to regain our name through the medium of the stock and other assets of the firm.* In response to this demand Mr. Fellman called us all kinds of names, stormed around a good deal, and told us he would not be blackmailed, and refused to concede anything. Mr. Fellman did not wish his name to appear in the trust deed, and as I understood it, *one of the principal reasons was that the business was to be continued in his name in some shape until we could make a settlement.* I never did clearly understand why the change was made, and the trust deed executed instead of conveyance to Fellman of the stock, or of enough of it to secure him against the liabilities he had assumed as indorser, but there was sufficient argument brought to bear at the time to induce me to consent to the change. (R., 192-3.)

* * * * * * *

We had considerable trouble to get credit after the spring of 1892. During the spring and summer 1892 *we were restricted or entirely cut off from credit by parties from whom we had bought on credit for many years. There was considerable talk and rumor of our firm being in a failing condition.* Intimation came to me *by being refused credit, and we asked for explanations and were told why. We received several letters upon the subject, and we realized that we could not continue unless* we met with *extraordinary* good luck or fortune. We continued to purchase goods *up to within a few days of giving the trust deed.* * * * *We bought on credit.* (R. 191.)

L. A. GRELLING.

I looked after the bank affairs of Freiberg, Klein & Co. on the outside—their money matters; did some borrowing for them.

They had their checking account in the year 1892 with the Island City Savings Bank, but they borrowed money from several institutions—the Citizens Loan Company, Adoue & Lobit, the First National Bank, the American National Bank, and private parties. The Irving National Bank of New York did business with them as a foreign account. The bank paper was paid or extended from time to time, as I observed in their business that year. It was about 1887 when they changed their checking account from the Texas Banking and Insurance Company to the Island City Savings Bank. From that time on they did no business with the Texas Banking and Insurance Company. They did no other business with the Citizen's Loan Company and Adoue & Lobit, except to borrow money from them. I think at no time after they began doing business with the Island City Savings Bank did they cease to be debtors of that bank. The paper and debts were extended or renewed because they did not have the money to pay it, or needed it for other purposes, or it did not reach around as far as they wanted it to go. Their limit of credit was reduced. I do not know that this was the case at the Island City Savings Bank. It might have occurred in other places. At the First National Bank we were several times requested to reduce our line of credit. At one time during Oppenheimer's administration it was reduced to the extent of $5000 at the First National Bank. We deposited with the Island City Savings Bank, and checked against it. With the other banks we got money from them as we wanted it and could get it. It was about two years before the failure that Oppenheimer requested the reduction of the line of credit at the First National Bank. This was the only reduction that was made, except, perhaps, with the Irving National Bank. I think they reduced that once $5000. At the Citizens' Loan Company they owed probably $15,000. At the First National Bank, I think the largest amount they ever owed there was $25,000, and it was reduced to $20,000 at that time; afterwards got the $5,000 back again. They owed the Island City some $30,000 on indorsements, but they owed them more money on collateral security. Sometimes we had trouble in getting paper renewed, because the banks claimed they wanted to reduce the loan and give it to somebody else, or they owed too much, more than their account justified. If we could not talk them out of it and get the money there, we would have to get it some-

where else; generally tried to talk them out of it. I considered Freiberg, Klein & Co. insolvent on December 16, 1892, *and for several years before.* My knowledge was derived from the general connection with their books, their business, and accounts. I think the members of the firm were aware of the status of the business. (R., 197-8.)

Interrogated with respect to a report made to the Commercial Agency, September 29, 1892, by Freiberg, Klein & Co., showing net worth of $208,623.35, the witness said:

We usually made reports in February. This was necessarily a *special* report, a *call* report, as they call it, made when a subscriber to the agency has a special desire to learn something of the credit or standing of the merchant who is doing business, and *something calls him to ask for a special* report. He goes to the commercial agency and asks for such a report, and the agency's duty is to go to that firm and ask for a special report. I should judge this is a call report, not a regular report. (R., 199.)

E. H. GORSE.

Speaking to the said report of September 29, 1892, the witness said:

The statement was rendered after a request on my part, *as I had information from other sources that the firm was in a shaky condition and their credit suffering.* I called upon them for an honest statement so that I could verify *rumors about them,* or deny them if they were false. I expected them to make an honest showing, and regret that I believed at the time that it was an honest showing. * * * Large firms were asked for statements once a year. I asked for an additional statement from *this* firm, for the reason above stated, that I had information from other sources that they were shaky and their credit suffering. *The firm's credit was becoming a matter of concern in mercantile circles,* and it became necessary for me to inquire more thoroughly into their financial

condition. I therefore asked for statement, and while I might have questioned the value of all the assets stated, I regarded these figures as showing a healthful financial condition, provided their representation as to liabilities was correct. Rumors were afloat that they were slow in payments, owing largely to banks and individuals, credit refused them in some quarters, and generally that their business was not healthful. *Inquiries as to the financial standing of the firm came from Northern and Eastern cities, local banks and firms. There were rumors in Galveston general in their character, and discussed among brokers, bankers and merchants.* These rumors affected me to the extent of desiring to post myself as to the foundation for them, and I made inquiries generally with somewhat unsuccessful result, as Seinsheimer and Grelling *misrepresented the financial condition of the firm, and banks were not willing to tell the truth about the firm affairs in so far as related to the banks.*

The rumors referred to, and the nature and character of which I have stated, were certainly of sufficient importance *to suggest a most rigid investigation by interested parties.* (R., 206–7.)

LEWIS WERNER.

In the fall of 1892, we (Moerlein Brewing Co.) had information that led us to make inquiries concerning the financial condition of Freiberg, Klein & Co. They owed us quite a large amount of money, and we heard bad rumors about them and wanted to satisfy ourselves whether they were all right or not. I went to Dun and Bradstreet, and told them we had unfavorable opinions about them and wanted special reports. We were supplying them with goods, and were interested in knowing their true condition with reference to future transactions, as well as with reference to what they owed us at the time. [Witness here identified paper as statement furnished him at that time by Dun's Agency in response to his inquiry.] After having heard these rumors and having these reports, we thought the rumors were unfounded, and that Freiberg, Klein & Co. were all right. They failed on the 16th. I left home on the 17th, and got to Galveston about the 19th or 20th. When I arrived I went to Freiberg, Klein & Co. to see how matters stood. (R., 210.) * * * He (Freiberg) said they were working at the books; he

could not tell then, but in a day or so he could tell. On (witness') second interview, Freiberg said he could not give any statement in that short time; it would probably take until the first of the next month. He told me he would like to run the Christian Moerlein Brewing agency in Galveston on a salary—sell beer for them. He mentioned it in that way. *After they got a settlement with us they would go right ahead; the beer would not change hands at all, would go right to the same customers.*

Freiberg and Seinsheimer stated * * * that they were in such shape they could not go on any longer, and had to fail because they were broke. (R., 211.)

Being cross-examined, the witness said:

With reference to the rumors we heard in the fall of 1892, prior to obtaining the report of September 29, 1892, we got a letter from *our agent in New Orleans that certain traveling men had told him that Freiberg, Klein & Co. had been refused credit, and that things looked kind of squally, and for us to look out.* That was the substance of the letter. We got *other* information. After getting the report from Dun and Bradstreet we were satisfied, and continued to sell them goods thereafter. (R., 212.)

*W. N. Stowe*, cashier First National Bank, did not know that Freiberg, Klein & Co.'s failure was impending before it occurred; had there been rumors affecting the solvency or standing of a large firm in Galveston he would have heard it; had there been such rumors concerning Freiberg, Klein & Co. he would have heard it—*from his own officers, if from no one else.*

But notwithstanding all this, the witness said, further:

I know E. H. Gorse, who represented R. G. Dun & Co. here. *He was in the bank several times to see me, as all these men do whenever they have an inquiry concerning the credit of anybody* in the city. I know he came in there once to see me *and asked me about Freiberg, Klein & Co.; said he was getting several inquiries, and wanted to know how they stood. I told him I knew nothing about them at all,*

*except we could say this for them, we had $25,000 of their paper, and we renewed it for them whenever they asked us to do so.* I did not tell him whether or not I considered them good. I do not suppose he asked me the question. I did consider them good, however. I would not have taken their paper if I had not. *We had indorsers on their paper, and that made it that much better, of course.* (R., 221.)

What is to be thought of the value of a witness' statement that no rumors hurtful to Freiberg, Klein & Co. were current, at a time when the commerical agent, whose business it was to receive and pursue such rumors, was acquainting him personally with the fact that *several inquiries* directed to the credit and standing of that firm were seeking replies—inquiries which, in their very nature and frequency, indicated the profound distrust which mere *rumors* do not reflect?

Think of the eccentric qualities of a mind that denies even the dignity of rumor to earnest inquiry, prompted by the solicitude and distrust of not one interested party, but of many, and pursued with intelligence and method by those whose sole business it is to answer it!

But whatever else may be suggested by the testimony of this witness, the most indulgent inference is, that he had little concern in, or aptitude for detecting the signs of, the financial decline of debtors *whose obligations were made sure by solvent indorsers*—especially when his "own officers," presumably as well content in the particular case as himself, chose to observe that silence which is golden.

*M. Lasker*, at the time of Freiberg, Klein & Co.'s failure, was vice-president, director and chairman of the

finance committee of the First National Bank—the same of which Stowe was cashier. He occupied the two relations last named to the Citizens' Loan Company also, and was, perhaps, its president. (R., 145.) The record does not seem to reflect his nominal official relation to the Island City Savings Bank, but he obviously regarded himself as holding substantially the same authority in the three companies whenever the value or safety of credits required consideration, decision or action. (R., 147–8.) It will not be forgotten that these three companies are practically representatives of the same interests —the Citizens' Loan Company owning a controlling property in the First National Bank and the Island City Savings Bank. (R., 143.)

*Lisker* enjoyed undisputed pre-eminence in all these institutions in the arts of passing on credits and keeping pace with debtors who failed to meet their obligations when due, or fell into insolvency before the time fixed for performance had elapsed. He had exercised his exceptional talents for many years, not only without criticism on the part of his constituents, but with their unquestioning, and, indeed, admiring approval. With modest and pardonable pride, he declares, in effect, that his long and fruitful experience, unbroken by a single lapse of fidelity, vigilance or wisdom, had, in his chosen and special sphere of mental and physical activity, won for him, "by common consent," the name and dignity of "expert." And yet it was he who did not "know" of the imminence even of a failure, occurring in his own city and under his own eyes,

of a vast concern whose promises to pay large amounts were held by all the special constituents whose safety from financial loss it was his paramount business, duty and interest to secure (R., 145-8.)—a failure foreshadowed long before by the fears and precautions of creditors in distant cities, by the eager inquiries of commercial agencies, by prophetic discussions among bankers, brokers and others who were his immediate neighbors, by the well-founded reports of ubiquitous "drummers," in nowise particularly concerned in the pending event.

May we not find explanation for this unwonted dullness of perception of signs which others were quick to see and interpret—for this presistent blindness to that which was revealed to the common vision—in the fact that all his constituents were shielded by the obligations of solvent indorsers, and could not lose (as the event proved), come what might?

May we not accept his own statement made *after* the fact as reflecting his sense of security *before*, and affording solution of his otherwise unaccountable lack of prevision?

> I led all the directors to believe that we were entirely safe and would not lose a dollar between the deed of trust and the *indorsement we had on notes.* Between the two there was no question but that we were covered beyond peradventure. (R., 149.)

Beers, secretary of the Citizens' Loan Company, understood Lasker's sense of security as due *altogether* to the *indorsements.* He said:

> Mr. Lasker was vice-president at the time, and he said *the indorsement of Fellman & Grumbach made it* (the debt due by Freiberg, Klein & Co.) *perfectly safe without the assignment.* (R., 220.)

The court's charge discloses the fact that the defendants relied *inter alia*, on the averment that *indicia* of fraud, intrinsic and extrinsic, characterized the trust deeds:

> They have also specially answered * * * claiming among other things that there were certain badges of fraud upon the deed of trust that was made—not claiming these badges rendered void the instrument upon its face, but these badges of fraud, coupled with other evidence, made it fraudulent in fact. (R., 229.)

These "badges of fraud" are now presented and discussed, as they were on the trial:

*First:*—Intrinsic:

1. Authority of trustee, as speedily as possible, to sell and convey the personality in *parcels* or as an *entirety*, at *public* or private sale. This is nothing short of authority to sell the goods *parcel by parcel*, and thus consume an *indefinite* time in disposing of them; to sell on *credit*, and take *promissory notes*, maturing at *remote dates;* to put the property into *negotiable* paper, transferable to good faith purchasers before maturity, and thus rendered secure against any process of creditors.

That the above provision of the deed reflects the authority ascribed to it by our construction of it, is signally manifested by the meaning assumed for it by the acts of the parties themselves—the trustee, the beneficiaries and their attorney.

Adoue testified:

> Sonnentheil finally asked the question if it was best to *sell the goods on credit or to sell them for cash, as a whole. We settled that point in favor of continuing the business as it was*, as we considered that character of business, a good deal in bar rooms,

there would be a great loss *unless the business was kept going on as it was.* (R., 152.)

Power to trustee to sell on *credit* is a badge of fraud. *Baldwin v. Peet*, 22 Texas, 714; *Eicks v. Copeland*, 53 Texas, 590. So is the power to sell at *private* sale. *Carlton v. Baldwin*, 22 Texas, 724.

In *Gregg & Son v. Cleveland*, 82 Texas, 187, the deed directed the trustee to sell the property in due course of trade for cash, and to carry on the retail business in the regular course of trade. *Held:* That grantor, being insolvent, the *necessary* effect of that part of the deed was to hinder and delay creditors, and *vitiated* the deed. *It placed the surplus for an indefinite period beyond the reach of creditors.* Upon the undisputed evidence, taken in connection with these recitals, the Court below should have charged the jury to find against the party claiming under the deed—citing Gallagher v. Goldfrank, 75 Texas, 565.

The *principle* of the decision is applicable here. It is true that the deed of Sonnentheil does not direct him to sell in due course of trade, nor to carry on a retail business; but it gives him a *discretion* that enables him to consume an indefinite time in realizing on the goods, and to sell on credit in such wise as may put the surplus beyond the reach of creditors for all time.

The case is to be distinguished from *Simon & Co. v. McDonald*, 85 Texas, 237, and cases there cited in briefs. There the power was to sell for *cash*.

*Haas v. Kraus*, 75 Texas, 106, was the case of attachment of an insolvent debtor's property, after it had been transferred and delivered to a trustee with power to sell and dispose of it "on such terms as to him may seem best." *Held:* That the question was for the jury, and

should have been submitted to them, whether the conveyance upon its face, and in connection with other circumstances in evidence, was fraudulent.

Although not in the same words, the grant to Sonnentheil is no more nor less than an investiture in him of the power to sell on such terms as may to him seem best.

In *Greer v. Richardson Drug Co.*, 1 Texas Civil Appeals, 634, it was held, that power in a deed to a trustee (the grantor being insolvent) to hold the goods conveyed for six months, only selling at the usual market price, in connection with the great excess of the value of the goods over the debt secured, unreasonably delayed other creditors, and was, as to them, void. Citing Gregg v. Cleveland, 82 Texas, 187, and Gallagher v. Goldfrank, *supra.*

We do not perceive that the power to hold for six months authorizes a greater delay (if, indeed, so great), as does the power to sell by parcel or altogether, at public or private sale, without restriction as to *mode* of sale, whether for cash or upon credit.

A credit provision is denounced as fatal in *2 Bigelow on Fraud*, 306-7.

An insolvent debtor can not deprive his creditors of their right to have his property converted into money without delay. He can make an assignment with preference, but he can not authorize his assignee to sell on credit. *Wait's Fraud. Con.*, secs. 332-3.

*Illustratively*, the following citations are in point:

*Wait's Fraud. Con.*, Sec. 11: Conveyance of real estate to trustee to sell and apply proceeds, *as fast as they can be realized*, to payment of grantor's debts, *necessarily* operates to hinder and delay creditors. So a trust lien on personalty *for an indefinite period*, the natural operation of which is to benefit the grantor, is fraudulent as to creditors. "The creditor must take care in making

his contract that it does not contain provisions of *no advantage to himself*, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose but his own indemnity. If he goes beyond this, and puts into the contract *stipulations which have the effect* to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract."

*Robinson v. Elliott*, 22 Wall., 523: A debtor can not take the law into his own hands and attempt to secure the delay which can only be obtained by consent of creditors.

*Wait's Fraud Con.*, Sec. 14: The debtor must devote all his property absolutely to the payment of his debts; reserve no *control* for himself (Means v. Dowd, 128 U. S., 281); provide for no benefit for himself (Lukins v. Aird, 6 Wall., 79), other than that which may result from the payment of his debts; impose no conditions upon the right of the creditors to participate in the fund; *authorize no delay on the part of the trustee.* (Oliver Lee & Co.'s Bank v. Talcott, 19 N. Y., 148.)

*Wait's Fraud Con.*, Sec. 331: Authority to trustee to conduct the business "for such time *as in his judgment* it shall be beneficial to so do," or to sell all the goods and stock in trade "*at such times and in such manner, and for such prices as he may deem proper*," renders assignment void as to creditors. "It is an attempt on

the part of the debtor to place his property, *for an uncertain and indefinite period*, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the *uncontrolled discretion* of a trustee of the debtor's own selection." (Jones v. Syer, 52 Md., 211.)

2. Alteration of the trust deed:

The original embraced the power to adjust and compromise debts at discretion of the trustee. This was erased, and the instrument, as altered filed with the county clerk as a chattel mortgage. Later, the second instrument was made—on Sunday. This restored the power erased in the original, *added the power to each partner to act for all the others in the course of administration of the business*, and *was never filed.*

The discretion conferred by the restored power is a badge of fraud; so also is the added power, because if Sonnentheil was really intended to be a *bona fide* trustee, and to have exclusive authority as such, no act of any of the grantors in connection with the property conveyed by the deed was necessary or lawful. They had nothing, in that case, to do with it; and the addition of the power shows that they had not relinquished their dominion over the property, and were contemplating some action concerning it contrary to the purport of the deed as originally expressed—such as effecting some adjustment with their creditors upon terms saving to them their business, and at least some of their property, as contemplated by their conspiracy with Fellman.

Mr. Levi, of counsel for Sonnentheil, testified that the purpose of the second instrument was to *confirm the interlineation in the first*; but pending its preparation, he and his associates—

thought it was *wise* also to have a power from the different grantors in the second instrument, each to the other, to make *further assurances of title or conveyance or documents that might be necessary for the expeditious conveyance and proper carrying out of the trust.* (R., 223.)

3. Provision for attorney's fees through the *whole course of administration:*

*Simons v. Ashe*, 1 Civil Appeals, 210, holds that authority to trustee to employ attorneys and to carry on the business for four and one-half months, are badges of fraud—not conclusive, but tending to show fraudulent intent.

*Wait's Fraud. Con.*, Sec. 335: Attorney's fees, *other* than for *examinations of the facts*, and for advice and services *in drafting the assignment and securing it to be properly acknowledged and recorded*, can not be lawfully provided for by the deed. At this point *the control of the assignor ceases.* (Hill v. Agnew, 12 Fed. Rep., 283.)

4. Uncertainty of items of indebtedness, as to amount, nature, dates of accrual, and maturity, and whether or not interest-bearing, and failure to show the amount, nature, and value of the debts, claims and demands due the grantors—thus concealing the fact as to whether the property transferred was greater than the debts provided for:

*Baylor v. Burns*, 3 Texas Civ. App., 178—citing Jackson v. Harby, 65 Texas, 715, and Haas v. Kraus, 75 Texas, 106.

*Second:*—Extrinsic:

1. Heavy purchases of goods just before transfer; and, in this connection, representations, known to be false, of large capital to the commercial agencies, inducing credit:

*Bump's Fraud. Con.*, 582–3.

2. Additional security of debts already secured by Fellman's indorsements:

*Wait's Fraud. Con.*, Sec. 241.

3. Retention by grantors of possession—whether absolutely or concurrently with the trustee—and practical direction of the business:

*Linn v. Wright*, 16 Texas, 24, is a valuable discussion of the theory of fraud arising from any agency of the grantors with respect to property after its assignment to the trustee. The instrument there was assumed by the court to be in the nature of a general assignment, although it preferred creditors. It purported to vest title and possession in the trustee, Linn, who was defendant in the suit. The property was in the grantor's possession when the writ was levied. The burden thus being on the trustee, he proved that the key of the storehouse was delivered to him, together with the assignment; that the fact of the assignment was well known; that the debts provided for were valid; that he was frequently in and about the house in which the goods were offered for

sale; that he collected money due the grantor before the deed was made; that he paid the license on the sale of the goods after; that he took and sued on a note given after the deed for an indebtedness due the grantor prior thereto. Plaintiffs proved that the trustee said he took the assignment for the purpose of aiding the grantor to get through his difficulties; or something to that effect. They offered to prove declarations of grantor and grantee, subsequent to the assignment, as to intention in making it.

Objection that only the *grantee's* declarations were competent, unless those of the grantor were made in the grantee's presence, and at the time of making the deed, was sustained.

They offered, also, to prove purchase of goods, after the deed, by a third party of the grantor, and the crediting of the price to an account due by the grantor. Objection that the grantee could not be affected by the offered proof, unless knowledge of the facts was brought home to him, was sustained.

It was shown that the grantor remained in the store, made settlements, and seemed to have charge of the business generally.

Evidence of acts of the grantor was excluded, on the ground that the grantee's knowledge thereof was not shown.

The Supreme Court held that *all the evidence excluded should have been admitted.*

In the course of the opinion it is said:

"His (the assignee) permitting the latter (the grantor) to remain in possession of the goods was apparently inconsistent with the terms and intention of the deed. It was *of itself evidence of fraud,* which required explanation. Having been permitted to retain possession of the goods, when the *deed* imported that the possession as well as the property in them was transferred to the defendant, and was to be retained by him, the presumption must be that he was permitted so to retain the possession *in accordance with the understanding of the parties at the time of making the assignment;* that the matter in which he dealt with them was in accordance with such understanding between himself and the defendant, and that the debtor was acting in pursuance of such understanding *and by authority of the defendant.* * * * It was perfectly competent to introduce the evidence proposed, for the purpose of showing that while the *deed* imports one thing, the *acts of the parties* import another and very different thing; that, in a word, their *acts had not been consistent with their deed;* and, *hence, that the latter did not contain a true exposition of their motives and purposes in making the conveyance.*" 43-5.

The court clearly declares that where the question at issue is the fairness or intention in making the instrument, the *books* kept by the parties, respectively, as well *after* as *before* the assignment, and other acts of the parties, should be admitted in evidence. Sonnentheil v. Texas Guaranty and Trust Co., 30 S. W. Rep., 951, 10 Civ. App., 274, a Texas case on the same facts, is to the same point; as are also *Linn v. Wright*, 18 Texas, 317, and *Eames v. Kaiser*, 142 U. S., 488, 492, cited by it.

In the case at bar—as has been shown by the statement—the business appeared to proceed after the deed was made as theretofore. The office employes remained the same and continued in the same line of service; the books of the grantors were kept up as if there had been no interruption of their business, and this without ob-

jection of the trustee; each of the insolvent grantors was employed in the business by the trustee at the very comfortable monthly salary of $300—Seinsheimer as bookkeeper and chashier; Klein as collector in north Texas; Freiberg as collector in east and west Texas. These gentlemen expected to resume business if they could make a "settlement." There seems to be nothing to explain why their regular books were kept after the deed was made, *unless* it be that they felt themselves to be *really in charge* of the business, or in a situation soon to *recover* and *continue* it, as before the deed. It, of course, goes for nothing that the trustee declared himself to have been in possession when the marshal attached, or that the marshal made the same declaration—if, *in truth and fact* the *res gestæ* declare otherwise.

2 *Bigelow on Fraud*, 337–8: The debtor must not retain possession; that is the real requirement of the law. Now the property, for one reason or another, may be incapable of any handing over, in the ordinary sense; in such a case, it should be enough, and it is enough, *for the vendor to withdraw from it*, upon the completion of the transaction, *and leave it with the buyer* * * * It is not the place where the property lies, *but the connection of the place with the owner, that shows the possession;* and so far as the element of mere delivery is concerned, *complete bona fide withdrawal of the seller* is probably sufficient in all cases.

The author cites, in note:

*German v. Cooper*, 72 Pa. St., 32: On the sale of goods and chattels they must either pass out of the seller to the buyer, *or the seller must pass away from them*, leaving them in the *exclusive* possession of the *buyer*.

*Wait's Fraud. Con.*, Sec. 249: To protect property from attachment by creditors there must be substantial and visible change of possession. The vendee must acquire the open, notorious and *exclusive* possession of the property, and this implies that the vendor is *divested of the use, possession* or *employment* of the property. (Rothschild v. Rome, 44 Vt., 389, 393.)

*Wait's Fraud. Con.*, Sec. 259: *Concurrent* possession of vendor and vendee is *colorable*. The possession of the vendee must be *exclusive*. If not, the transfer is fraudulent and void as to creditors. It is no change of possession to leave the property in charge of the vendor's agent.

4. Property conveyed in excess of debts secured, the excess being about $75,000.

*Jackson v. Harby*, 65 Texas, 710; *Haas v. Kraus*, 75 Texas, 106; *Baylor v. Brown*, 3 Texas Civ. App., 178.

Argument, accompanied by numerous citations, is directed by the plaintiff in error to show: that the fact is immaterial that more property is devoted by an insolvent and fraudulent debtor's trust deed to a debt due to a preferred creditor than is reasonably sufficient to satisfy it; and that there is a distinction between the legal *status* of such creditor and that of a creditor who receives by direct conveyance from such debtor property exceed-

ing in value a debt due, namely: that the creditor first named is secure, if, although having notice of the debtor's fraudulent intent, he is not a participant in the fraud itself—while the creditor last named is insecure, because affected with notice of the fraudulent intent, although not participating in the fraud itself. (Brief of plaintiff in error, 37–41.) And at another place the attempt is made to demonstrate that the property conveyed to the trustee here was not in excess of the debts secured. (Id., 57–9.)

The principal case relied on to support the argument is one wherein both the makers and beneficiaries of the trust deed were expressly found to have acted in good faith, the value of the land devoted to the debt not being more than fully to secure it.

True, the witnesses put the value of the land at $34,000, while the debt secured was $25,000, by promissory note; but when the trust deed was executed, the beneficiaries seem to have known that the makers were seriously embarrassed—involved in liabilities exceeding their assets—and the trial court may, very reasonably, have had in mind the delays and expenses which under such circumstances must have seemed to the beneficiaries as likely to attend the pursuit and realization of the debt due them, against the hostile interests of other creditors, when it did not find "that the value of the land was, *against all contingencies*, more than enough to secure the debt." (Simons Hardware Co. v. Kauffman & Runge, 77 Texas, 133–4, 136–7.)

The point ruled in Haas v. Krause, 86 Texas, 698, is that the fraudulent intent of *the debtor alone* does not affect the validity of a trust deed executed to secure a creditor: the ruling there attacked embodied the precise proposition that a failing debtor may give a valid mort-

gage "on *so much* property *as may be necessary*" to secure a *bona fide debt.* (887–7.)

No case cited will be found to declare free from suspicion the devotion to a debt of property in excess of such debt to an amount more than one-half thereof.

As has been before remarked (Brief 6, R. 194), Freiberg considered that the property conveyed by the trust deed, was, at that time *worth* about $220,000—more by about $75,000 than the sum of the debts named in that instrument.

The debts aggregated, say, $140,000. It is clear that Freiberg's figures were designed to reflect the *real* value of the property conveyed; for instead of giving the gross nominal assets, shown by the books, of $317,000, he allows as much as $97,000 between that aggregate and the real value.

On the other hand, it is well nigh inconceivable that of assets received by Sonnentheil, the trustee, aggregating $317,000, as much as one-half, within a fraction, were worthless, as asserted by him.

But, however that may be, the testimony of the two witnesses raised an issue of fact as to the real value of the property conveyed to the trustee and the excess of that value over the sum of the secured indebtedness, and it was for the jury to determine that issue.

Referring to the erasures in the first deed and the additions made to the second, the court, in its charge, said:

> As to the legal effect of these instruments, I think *upon their face*, they are legal instruments, and that the causes complained of amounting to badges of fraud or signs of fraud, I think as they apply to this case do not amount to that. The fact that the second instrument was not recorded, is immaterial, because the

plaintiff, Jacob Sonnentheil, under the undisputed testimony, was in the actual possession of the property, and therefore it was unnecessary to record it. His possession would be notice to all attaching creditors. *The continuing of the employes of Freiburg, Klein & Co. by the plaintiff would be a circumstance tending to show fraud*, but it would not be sufficient within itself, but *may be considered by you simply as a circumstance in connection with the other testimony* in determining the question of intent with which the instrument was made. (R., 234-5.)

It is not clear that the court intended to state, *as matter of law*, that the erasures and additions were not to be considered by the jury. The language admits of the construction that the court thought the instruments *valid on their face*, notwithstanding the erasures and additions. But, certainly no *greater* force can be accorded to the language than that the *erasures and additions—not any other* alleged badges of fraud—were excluded from the jury's consideration. It is true that in so far as notice to attaching creditors was concerned, if Sonnentheil was in actual possession, the record (*filing* is the requirement) of the second instrument was not necessary *to indicate the mere fact that he was acting as if he had such right as would inform such creditors that, in assailing it, they proceeded at their peril;* but this would not conclude inquiry into the *nature* of his title, nor evidence that, purporting to claim under one constituting instrument, his title really rested on another and distinctly different one, nor would it deprive the attaching creditor of the benefit of the potent inference arising from the fact of the existence of the second instrument and its vital variance from the first, that marks of fraud concealed by the one exhibited to

the public were revealed by the one of which the public had neither information nor means of information.

The point is entirely apart from and unaffected by the assumed fact of actual possession.

The court must have so considered it; for it expressly, and in the same connection, authorizes the jury to consider the fact of the retention by the plaintiff of the employes of Freiberg, Klein & Co.—a fact everywhere and always considered as one of that class of facts which go to the question of *whether one's possession is of a character and with a purpose that are in harmony with the instrument under which he holds.*

Therefore, the verdict of the jury and the judgment of the court are entitled to the support of every inference of fact that can be reasonably deduced from the internal and external symbols of fraud pertaining to the instruments themselves, or to the practical construction of them by parties and privies—considered in connection with all other evidence.

As has been seen, an appellate court of Texas has considered at length the same facts, substantially, (the issue of acceptance, however, being pretermitted) as were at issue below in this case, and announced the results of its examination of them, and of the law that applies to them, in terms of great force and clearness. Sonnentheil v. Texas Guaranty and Trust Co., 30 S. W. Rep., 945; 20 Civ. App., 274.

It reversed the judgment of the trial court for error in its instructions, to the effect that the fraudulent intent of

the makers was sufficient to avoid the trust deed, without respect to knowledge thereof by the beneficiaries. Quite recent decisions were relied on; and earlier cases urged in support of the judgment below were disregarded or reversed.

Art. 2465, Rev. Civ. Stats.; Baldwin v. Peet, 22 Texas, 710, 713, 715-6; 718, 721-2.

Brown v. Texas Cactus Hedge Co., 64 Texas, 396; cited in 8 Am. and Eng. Encyc. of Law, 756.

Simons v. Ash, 1 Texas Civ. App., 208-9, following Baldwin v. Peet, *supra*; Kendall Boot Co. v. Johnson, 24 S. W. Rep., 585, also following Baldwin case.

But as to admissibility of evidence and other questions involved here, the opinion is most instructive. It should be doubly so, since it proceeds from a court *in contact with the very case*—in substance—now before this court.

*SECOND.*

The contract created by "acceptance" is one of mutual obligation; and, to be effective against a stranger who disregards it, must have been entered into by the acceptor in good faith and without notice or means of notice of the fraudulent intent with which the instrument accepted was made, and be of such purpose, certainty and clearness that it binds the acceptor to rely upon the provisions made for him by the instrument, and to refrain from pursuit of other remedy against the maker thereof or his property, unless or until the provision fail.

If the evidence in this case tends to show a contract of acceptance by any beneficiary of the deeds of trust under which the plaintiff in error claims, it is not such contract as is defined, and the jury were warranted in finding adversely to him on that issue.

Whatever else he may have said, not a single person named in our adversary's brief as an acceptor of the trust deed testified that, in accepting, he relinquished, or intended to relinquish, for any time or in any degree, such remedy for the realization or security of the debt due him by Freiberg, Klein & Co., as might be available, independently of the provisions made for and the property subjected to such debt by the deed.

In interpreting the testimony on the issue of acceptance, a fact more important to be considered than any other is one that does not appear in the record at all, but, nevertheless, demands recognition, since it is matter of public history. It is, that at the time the Freiberg, Klein & Co. trust deeds were executed it was thought to be the law in Texas that when such a deed was made to and accepted by a trustee it operated to secure creditors named in it, though they had no knowledge of it when so given and accepted, nor when a creditor of the maker attached the property covered by it, and never themselves accepted it; and that nothing short of a renunciation of it by them would expose to such attachment the property so covered for their account. At that time it was generally—it may safely be said, universally—assumed that one was *presumed* to accept such an instrument when beneficial to him.

The authoritative judicial announcement that the law was otherwise—that acceptance was a contract, and like any other contract required to be of form and substance showing actual assent of the creditor upon consideration

moving to and binding him—was made by our Supreme Court, in *1894*, in the case of *Alliance Milling Co. v. Eaton, Guinan & Co.*, 86 Texas, 401.

Search for any indication in this record that any so-called accepting creditor supposed that such assent, on such consideration, was necessary to his protection, will prove vain. True, there are not wanting *indicia* of the presence of the self-protecting and conservative *afterthought;* but, notwithstanding, the statement will be found true.

There is not a shred of *writing* anywhere to say that any one accepted; not that writing was *necessary* to effect acceptance, but it is strange that no one used that certain and enduring medium of expression on occasion so strongly suggestive of the prudence of doing so—*if* he knew that his rights depended on his own, and not the trustee's, assent.

Take Lasker. He purported to "represent" three banks. Not one of these was shown to have adopted a resolution or other act with respect to the trust deed; nor does it appear that the subject was ever officially considered in any way by any one of them as a corporation. Lasker said:

> The First National Bank accepted the security provided for in the deed of trust. * * * After I saw mention of it in the paper, the next information I had was from Mr. Sonnentheil, who came to me and told me of it. I did not accept in terms; did not say the words, "I accept." *I did not see any occasion for that. I treated it as a benefit that was extended to me, and it was my province then to deal with it.* When I say me, I mean the First National Bank. (R., 146.)

Certainly he did not say, "I accept." Why should he, when he saw no occasion for it—that is, deemed it wholly unnecessary—treating the deed as a *benefit extended to him* and to be *appropriated by him*, without assumption of any corresponding obligation on his part?

The quoted and italicized lines perfectly reveal his conception of the transaction, and recall the preceding positive statement that the bank accepted the security. After adding that he represented, also, the Citizens' Loan Company and the Island City Savings Bank, he recites that Sonnentheil came to him, and, assuring him of his great confidence in his experience, consulted with him—not about accepting the deed, but—as to the retention in his service of the grantors and others. He spoke to him, however, as the "representative" of the three banks. Lasker advised a meeting of the different parties in interest, and such a meeting was held. There the main question discussed was, *whether Sonnentheil should sell goods otherwise than for cash, and it was unanimously determined in the affirmative.* The witness, reciting the facts of his participation in the proceedings of this meeting, said:

> I carried on the conversation in such a manner that Sonnentheil must have been *justified in believing* that I was there representing these institutions as an accepting creditor under this deed of trust. (R., 147.)

Later:

> The only member of the firm of Freiberg, Klein & Co., that I ever spoke about this matter with was Freiberg. It was the same day I first learned of the deed of trust. He came to show

**me that he had dealt in good faith with these three institutions which I represented, and done the best he could to protect them. *I did not understand that it was a formal question as to whether I should accept or not*, but from the conversation which occurred between us *he had every reason to believe* I had accepted, and I had *nothing else in my mind* but that. That was the meaning I *intended* to convey. (R., 148.)**

* * * * * * *

**None of these institutions that I know of *repudiated or rejected* the securities provided in that deed of trust to Sonnentheil. (R., 149.)**

It seems to me clear that the only natural and obvious inference that the language of the witness warrants is, that the deed, made to and accepted by the trustee, *of its own force and without assent of the beneficiaries or the assumption of any obligation by them in consideration thereof*, "extended" to them a "benefit" which they could avail of or decline, at their option; and that their rights were secure so long as they did not *repudiate* or *reject* the deed.

It is, upon any other hypothesis, inconceivable that a man of his intelligence and business equipment should have left so important a fact as his acceptance of the deed to be *conjectured* by both the trustee and the maker with whom he had held converse about it, when it needed only a single written line or a single spoken sentence to *assure* it.

And not more to the witness than to the trustee and the maker does this reflection apply, since it was the duty of one and the interest of both to have of the wit-

ness an unequivocal declaration that he accepted the deed and abided the obligations arising from that act.

It becomes important to refer to Mr. Lasker's testimony in a somewhat different, though scarcely less important, connection.

While speaking of himself, generally, as representing the three banks named, he admits that Kempner, the president of the Island City Savings Bank, had "first accepted" for *that* bank. (R., 148.) And, in referring to the meeting that considered and decided whether the trustee should sell on other than cash terms, he says:

> Kempner asked me to speak for the Island City Savings Bank, and it was the understood agreement of both of the other institutions that I represented them. * * * Kempner was not present. He was president of the Island City Savings Bank, and *first told me about the arrangement. He seemed to have known of the arrangement before I did; that is, the deed of trust and that meeting which he called me to attend for the Island City.* He himself was busy. *He seemed to understand the situation when I first heard of it, and I took it from what he told me.* (R., 147.)

Kempner did certainly "understand the situation" quite early enough. He assisted to organize and maintain the conspiracy of which "the situation" was the result, and it is upon the fact that *he* "first accepted" the trust deed that the right of the plaintiff, as trustee of the Island City Savings Bank, must rest. (R., 189-92, 147-8.)

*Dr. Fly* said:

> The evening the deed of trust was made I heard some little rumor that the failure was contemplated. Some one mentioned it on the street. I do not remember. That night at 10 o'clock Seinsheimer telephoned me himself; said they had failed. They

had put me on the list of preferred creditors and *headed the list with me*, and I told him I knew it would be all right. *I never gave it a moment's thought*; I told him that it was all right; *I had not concerned myself about it. I was practicing medicine.* I saw Seinsheimer next day. He mentioned the fact again, as he had telephoned me. I said it was all right. I was paid by Sonnentheil the full amount of the claim. *I never repudiated the deed of trust* nor the money which Sonnentheil offered me. (R., 151.)

Dr. Fly seems to have entertained the same view as that of Mr. Lasker as to the operativeness in favor of creditors of a deed to a trustee. He was a busy, professional man—was at the head of the list, and evidently felt secure; had no concern; gave the matter no thought; didn't even remember the "some one" who spoke of the failure on the street; never *repudiated* the trust deed.

It may be added, that the requirements of the profession which engaged this gentlemen would necessarily lead to associations so extended that they could scarcely fail to embrace that circle of bankers, brokers and business men to whom the situation of Freiberg, Klein & Co. had long before been the theme of discussion; and it is noticeable that he does not disclaim information likely to be acquired from such associations.

*B. Adoue* was a member of the firm of Adoue & Lobit, bankers, creditors of Freiberg, Klein & Co. at the time of their failure, by their unsecured note for $5000, and their notes for $10,000 secured by Fellman & Grumbach's indorsement. Sonnentheil told him on the morning following the failure that the firm was secured by the trust deed, and his assistance would be expected in the management of the business. This was promised. He could not re-

member the words with which he answered Sonnentheil's notice of the failure; "said it was all right, very glad he was assignee; hoped we would get our money back." He attended two or three meetings—one, he thought, on the day following the failure, at which was "discussed the policy which would be best for disposing of the business and getting our money out of it." This was at the office of Scott, Levi & Smith. Sonnentheil, Lasker, Levi, *Fellman* and *Grumbach* were present.

Sonnentheil finally asked the question if it was best to *sell the goods on credit or to sell them for cash, as a whole.* *We* settled that point in favor of *continuing the business as it was,* as we considered that character of business, a good deal in barrooms, there would be a great loss *unless the business was kept going, and we thought it best to keep the business going on as it was.* * * * I did more than indicate my acceptance of the security that was *given* me by the deed of trust. *We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it; that was my idea.* (R., 152.)

There is not the least indication here that Adoue understood that the facts related had any further consequence than the provision for his firm, and others, of means through which the duties imposed on the trustee by the deed could be made impossible of execution, and such of the creditors as attended the meeting could arbitrarily usurp control and disposition of the property and "keep the business going on as it was," for their own account. Even *Fellman's* co-operation was availed of to promote the enterprise.

One of our criticisms, applicable alike to both deeds, was and is, that the trustee is thereby vested with power

to sell on credit and indefinitely prolong the period of disposition. This was, and is, denied by our adversaries; and Mr. Levi testified that, when consulted by Sonnentheil on that point, his firm advised that the deed did *not* authorize sales on credit. He added, however, that when Sonnentheil explained that the assets held by him consisted largely of barroom accounts, which would in great part become worthless if supplies to barroom patrons were suddenly cut off, and that, besides, these patrons would have to suspend business, he directed him to consult the parties interested, and thereupon the meeting, to which Adoue and other witnesses refer, was convened and the question discussed. (R., 224.) We have seen how it was decided.

Mr. Levi further remarked, that at the time he directed Sonnentheil to proceed in the manner indicated, no hostile process had challenged his title as trustee. (R., 224)

It would seem to have been Mr. Levi's view that notwithstanding a *deed* to a trustee does not empower *him* to sell on credit, yet, when no stranger has assailed his title, he may lawfully submit *to the creditors preferred in the deed* the question whether or not he shall so sell, and abide their decision.

It is somewhat difficult to apprehend how the persons for whose benefit other persons have, by a deed, confided in a trustee certain powers, not including the power to sell on credit can, by virtue of the failure of strangers to

challenge the deed, acquire and exercise the omitted power.

For the rest, Mr. Adoue, from the nature of his business and the place of his residence, should have known, if he did not, all that others knew of the situation and proceedings of Freiberg, Klein & Co.

No part of Adoue & Lobit's debt was paid. (R., 152.)

*Mr. Marx* had lived *for many years* in Galveston; a *member of the firm of Marx & Blum*; made the transaction by which S. A. Walker became a creditor of Freiberg, Klein & Co., out of which resulted the debt, $15,000, of that firm to Walker at the date of their failure; learned of the failure the morning following its occurrence; did not know of it before; talked to Fellman about the trust deed; he was indorser of Walker's paper; accepted under deed probably next day, to Seinsheimer, he thought, was authorized to do so for Walker; Walker was then in Missouri; had *telegraphic* authority from him; *may not be able to find it now;* telegraphed the fact of the failure to Walker, and he replied by telegram that he *looked to him* to *protect* his claim; did not release Fellman or Grumbach; did look to them as a last resort; got the money; somebody paid it—the receiver he thought; *was out for money and did not care through what medium it came to him.* (R., 155–6.)

According to the "receiver," Mr. Marx was in error as to the source from which the money was derived. Mr. Sonnentheil, whom we presume was meant by that designation, testified that he paid nothing on the claims

of either American National Bank, Adoue & Lobit, Citizens' Loan Co., George Ketch, Mrs. A. Lowenstein, Irving National Bank of New York, or *S. A. Walker*.

The payments made by him aggregated $48,206.73—to Island City Savings Bank, $29,256.16; to First National Bank, $13,391.19; to A. W. Fly, $3913.91; to B. Kahn, $1645.47. (R., 117.)

Mr. Marx was probably mistaken, too, in stating that he looked to Walker's indorsers "as the *last* resort;" for it was an admitted fact that those indorsers paid the debt due Walker.

Indeed, the payments made by Fellman & Grumbach and those made by Sonnentheil discharged every debt due the beneficiaries of the deed, save only that of $15,000 due Adoue & Lobit.

Without denying the facts which involve Freiberg, Klein & Co. in a long course of fraudulent deception of the Brewing Company and the public, whereby credit and goods were obtained under pretenses known to be false, and with the proven purpose of self-aggrandizement at the expense of their creditors, the plaintiff would have it that evidence of this flagitious conduct was impotent in *his* suit against their intended victims. This is pressed, for the most part, on the assumption that nothing occurring before or after the trust deed could affect the plaintiff or the accepting creditors, in the absence of proof of their privity in fact with such occurrence. Authorities already cited to the competency of evidence of all facts preceding, attending or following the alleged

fraudulent act, overthrow this assumption, and it is passed without further remark; but we would consider the further contention, presented with the foregoing in some of the assignments, that the judgment should be reversed because of the admission, in connection with the testimony of the witnesses Gorse and Grelling, of copies of documents not shown to be lost or inaccessible.

The eleventh assignment (R., 243-4) admits, at its close, that the *original* report of *September 29, 1892*, made by Freiberg, Klein & Co. to the commercial agency, "showing net worth of $208,623.36," was put in evidence by the defendants; but objects to the testimony of the witness Gorse, because it "related to and embraced copies of original documents not shown to have been lost and not produced or otherwise accounted for, and which were better evidence than the copies." It will appear from Gorse's testimony that he states, *as an independent, affirmative fact*, that Freiberg, Klein & Co., made reports to the commercial agency, not only on September 29, 1892, but also on February 13, 1892, and February 1, 1891, grossly exaggerating their capital. True, he has before him, attached to the interrogatories, sheets purporting to contain copies of such reports and is asked whether these are substantial copies, and he says they are; but he says, also, that they did make the original reports, and mentions the details of their delivery to him by Grelling, in whose handwriting they were, for and at the instance of Seinsheimer, a member of the firm of Freiberg, Klein & Co. (R., 206-8.)

The sixth, seventh and eighth assignments complain in like manner of Grelling's testimony in connection with copies of the reports to the commercial agency of March 14 (February 1), 1891, and of February 13, 1892. (R., 241.)

Grelling identifies the original report of September 29, 1892, saying that "we," that is, Freiberg, Klein & Co., made regular reports to the commercial agency annually, in February; that *this* was a special or call report, and was false, and that the firm could not have continued business had a true report been made. (R., 199.) The plaintiff drew from the witness, on cross examination, a statement showing the same "net worth" as that of September 29, 1892, of which the words were in Seinsheimer's, and the figures in Freiberg's handwriting. (R., 203.) The witness was shown copies of the reports of February 13, 1892, and February 1 (dated March 14), 1891, and said they were copies from the agency's boards, or files. His evidence went no further as to the report of February 1, 1891. (R., 201.) As to the report of February 13, 1892, he declared that the surplus, or "net worth," shown by it—$200,987.42—was false; that he considered the firm insolvent then. (R., 200.)

If on the record thus presented it can be said that there was error, it must be seen that it was merely technical and harmless, and could not have prejudiced the plaintiff's case. Aside from the fact that Gorse testified directly and independently that false reports were made

in February, 1891 and 1892, the known fact and falsity of the latter and far more significant special report of September 29, 1892, was established without contradiction—was, indeed, put in evidence by the plaintiff in error himself. (R., 203.) And, in addition to this, Werner obtained of the agencies independent reports of like character, in the fall of 1892 (R., 210); and that reports purporting to show their financial condition were made annually, in February, by Freiberg, Klein & Co. to the commercial agencies, and that they knew themselves to be insolvent from about February 1, 1891, if not earlier, is indisputably shown by Freiberg. (R., 187-191.)

But these contentions, although reflected by assignments of error repeated here, do not, perhaps justify notice by us in this court. They are pretermitted by the petition of the plaintiff in error to the Circuit Court of Appeals for a rehearing (R. 260-2); and the eighth question, stated on page 36 of this present brief and argued on pages 76-7, is restricted to another and different contention.

The Circuit Court of Appeals, upon repetition before it of the identical claims for relief which had been denied to the plaintiff below by the verdict, judgment and refusal of new trial, affirmed the judgment assailed, and, afterwards refused to rehear the case. Its opinion is a luminous reduction of the case of the plaintiff in error to the contention that the judgment of the trial court should be reversed because that court refused to instruct the jury, peremptorily, to find for the plaintiff:—

Before Pardee and McCormick, Circuit Judges, and Speer, District Judge.

McCormick, Circuit Judge, delivered the opinion of the Court:

This case is brought to us on writ of error to the Circuit Court for the Eastern District of Texas. The statement of the evidence embraced in the bill of exceptions covers 169 full octavo pages of the printed record. The general charge of the court covers 9 pages of the same printed record, and the assignment of errors covers more than 20 pages. The distinguished gentlemen who appear as counsel for the parties have filed printed briefs of their respective propositions, authorities, statement of the evidence and argument thereon, admirably condensed and able, covering the one 54 pages and the other 55 pages. The respective counsel have also been fully heard in oral argument. From all of which it clearly appears that the only alleged error in the trial in the Circuit Court of which the plaintiff now complains is the failure of the trial judge to direct the jury to find for the plaintiff and leave to the jury only the matter of assessing the damages. On this point the plaintiff requested the court to charge as follows: "The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been at the time of its execution the bona fide debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by The Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said brewing company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed, and converted them to the use of said brewing company. You are therefore instructed to

find verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon, at the rate of six per cent per annum, from the date of such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized; neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

There was no error in refusing this request. It asks much more than the giving of the general charge. We have had occasion in several cases to notice and disapprove the practice of attempting by a request for the general charge to practically convert severely contested actions at law into suits in equity, and thus force on the judge of the Circuit Court the work of trying complicated issues of fact without the aid of a master or that opportunity for time to consider which a hearing in equity affords, resulting, when judgment goes against them, in their bringing up all the evidence in its amplest detail to this court as if the case was here on appeal. If by stipulation a jury had been waived and the trial had proceeded before the judge alone, neither party could have demanded or rightly asked the judge to make special findings of fact. Baer v. Key West, Fed. Rep. This request not only asks the court to make at least five special findings of fact, but that the findings shall be in favor of the plaintiff. It may have been the duty of the court to instruct the jury as to the legal effect of the written instrument relied on in this case as a deed of trust if the court had not already instructed the jury on that subject as follows: "I have inspected this deed of trust and my opinion is that upon its face it is a legal instrument; that upon the execution and delivery of that instrument to Mr. Sonnentheil that it vested the title in Mr. Sonnentheil—the title therein named—for the purpose therein named." As a request for a charge as to the measure of damages it was rightly refused because it was fully embraced in the general charge in terms of which the plaintiff could not and does not complain; to illustrate which we quote from the general charge as follows: "Where an attachment is levied upon property that has been placed in the hands of a trustee, if no creditor has accepted before

the attachment is levied, the trustee can not recover, but if any creditor has accepted the terms of that instrument before the attachment has been levied the trustee can recover, unless defeated upon the ground of fraud. What I mean by that is this: This matter has been argued before you and ably, upon both sides; well presented by the attorneys for the parties on both sides. The contention has been that even if some one creditor did accept that the trustee could recover only to the extent of the debt thus accepted. The other party has contended that that was not the law; we being in a court of law, that you could not marshal assets and have an adjustment of the equities; that consequently it was legal or illegal. I agree with the latter contention. I hold as a matter of law that if you find as matter of fact that if any creditor accepted the terms of this instrument before the levy of the attachment and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed the entire property named in this deed passed to the trustee, and for this action he may recover for whatever it may be shown the property was worth at the time and place it was taken. I mean if you believe from the evidence that there is a single excepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in the possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of six per cent per annum from that date until now." We express no opinion as to the instructions just quoted further than to say, as we have above said, that the plaintiff does not and can not complain of them. Our conclusion on the case is that the plaintiff does not suggest and now urge any error in the rulings of the Circuit Court for which its judgment should be reversed, and it is therefore affirmed. (R. 283-5.)

We assume that since the present writ is brought to reverse the judgment of the Circuit Court of Appeals, no claims will, or can be properly, urged here, save such as were presented by the petition to that court for a rehearing.

These were, in substance:

1. Refusal to maintain the thirteenth assignment, viz. That the trial court declined to charge, that mere knowledge of the debtors' insolvency was not sufficient to put the beneficiaries of the trust deed upon inquiry as to the debtors' alleged fraudulent intent.

2. Refusal to maintain the eleventh assignment, viz: That the trial court admitted the testimony of Gorse of rumors prevalent in Galveston as to the threatened insolvency of the debtors—the witness declining on cross-examination to give the source or particulars of the rumors.

3. Refusal to consider the fourteenth assignment, viz: That the trial court erred in its charge as to what constituted "acceptance" by a corporation, and in refusing a special instruction offered to correct any misapprehension on that subject.

4. Failure to determine a point involved in the first, second, third and fourth assignments, viz: That the trial court improperly admitted evidence of misconduct of the debtors after the trust deed was executed and the trustee was in possession; because the beneficiaries' rights were not affected by it—since they could not have known at the time of their acceptance facts that had not then transpired.

5. Holding that the trial court rightfully refused to give the general charge requested by the plaintiff, taking from the jury the right to determine the acceptance *vel non* of the trust deed by any of the beneficiaries prior to

the day of attachment; and whether, if accepted, it was accepted without notice of the fraud in the deed—"there being no conflict of evidence on these questions, but the undisputed testimony showing such acceptance and want of any such notice."

6. Failure to determine the validity of exceptions to the general charge in so far as it left to the jury to determine said questions—the plaintiff in error claiming that the points were made by the eighteenth and nineteenth assignments.

7. Failure to consider the twentieth assignment, viz: That the evidence was insufficient to support the verdict. (R., 260-2.)

The three assignments added in this court—twenty-first, twenty-second, twenty-third—and directed against the Circuit Court of Appeals only, are, in substance: That it erred in holding that the only question submitted for its decision was the refusal of the trial court to give the peremptory charge, recited in the twelfth assignment, and in holding that said charge asked the court to make several special findings; and in refusing to reverse the judgment. (R., 280-1.)

It is believed that the unsoundness of the various propositions relied on by the plaintiff in error, as applied to the case at bar and affected by the plaintiff's acts of commission and omission in the course of the trial, is disclosed by the record itself, and we are disinclined to indulge further argument.

Surely enough has been shown to secure against reversal the judgment rendered by the trial court on the verdict of the jury on issues of fact, and maintained by that court against motion for new trial; and, again, maintained by the Circuit Court of Appeals, both on original submission and petition for rehearing.

In Texas, the trustee in a trust deed acquires no *title* of any kind in the property subjected by the deed to the claims of creditors of the maker. Whatever seeming title he may acquire is derived, not from the instrument executed to him by the maker, but, from the act of the creditor accepting it. If the debt of such accepting creditor be discharged after the deed is executed—or if there be more than one such creditor, then to the extent that the debts are discharged—the deed, being a mere security, is itself satisfied, and the whole basis of the trustee's "title" disappears. Yet, the plaintiff in error, confessedly owing such right as he may have to his trusteeship, seeks to recover the total value of property attached by honest creditors and judicially appropriated to the satisfaction of their debts, although it is admitted that all the creditors in whose behalf he was constituted trustee, and to the existence of whose debts he owes such rights as he may possess, have been paid in full—save only one firm, claiming but denied to be accepting creditors in the sense of the law, asserting a still subsisting indebtedness, in an amount which is relatively insignificant.

And, besides, such remedy is pursued in the face of the clearly established fact that sums, largely exceeding the claim of the unpaid firm, have been collected by the plaintiff in error as "trustee" and paid to one or more parties, named in the deed, of whom neither want of knowledge of the fraud assailed, nor "acceptance" according to the requirements of law and in good faith can be fairly affirmed on the evidence.

Counsel for Defendants in Error.

# SONNENTHEIL v. CHRISTIAN MOERLEIN BREWING COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 45. Argued October 18, 19, 1898. — Decided January 3, 1899.

A suit against a marshal of the United States, for acts done in his official capacity, is a suit arising under the laws of the United States; and the joinder of another defendant, jurisdiction over whom is dependent upon diversity of citizenship, does not deprive the marshal of rights he would otherwise possess.

In an action assailing the validity of an assignment by an insolvent debtor with preferences, if there be a conflict as to the words used, or if the words themselves be ambiguous, the question of intent must be left to the jury.

There is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud.

Under the peculiar circumstances of this case, it was not error to submit to the jury the question of fraud referred to in the opinion of the court.

THIS was an action at law, brought by Sonnentheil, trustee under a deed of trust executed December 16, 1892, by Freiberg, Klein & Co., of Galveston, Texas, against the Christian Moerlein Brewing Company, an attaching creditor, and one Dickerson, whose Christian name is unknown, marshal of the United States for the Eastern District of Texas, to recover the value of a stock of goods seized by the marshal under writs of attachment in favor of the Brewing Company.

Prior to December 16, 1892, Moses Freiberg, Sam Klein and Joseph Seinsheimer were, under the firm name of Freiberg, Klein & Co., conducting a wholesale liquor and cigar business at Galveston, Texas. Having become embarrassed and unable to meet their liabilities, upon the date above named, they conveyed by deed of trust to the plaintiff Sonnentheil their stock of goods, together with their other property and the debts due them, authorizing him to take immediate possession thereof, to sell the property and collect the debts, and apply the proceeds to the payment of certain creditors named in the deed of trust. This deed was filed as a

chattel mortgage with the county clerk of Galveston County, Texas, on the day it was executed, and the plaintiff in error as trustee took immediate possession of the property therein conveyed.

Another deed of trust, dated December 17, was executed by the same parties to the same trustee to secure the same debts. This deed differed from the first only in inserting some words which had been erased from the first deed, in giving the trustee the power to compromise or sell the debts due the firm, and in binding the grantors, and each of them, in the name of the firm, to make such further assurances as to the property conveyed as would speed the execution of the trust.

Sonnentheil was holding the property in question under both of these deeds when, on December 23, 1892, a United States deputy marshal seized and took it from his possession against his protest. This seizure and dispossession were made by virtue of a writ of attachment from the Circuit Court for the Eastern District of Texas, in a suit for debt by the Brewing Company against Freiberg, Klein & Co., and the seizure was directed by an agent of the company. The Brewing Company was not secured in the deeds of trust. This suit was brought by Sonnentheil, the trustee, against the marshal and the Brewing Company to recover the value of the goods thus seized and taken from him.

The defendant demurred to the jurisdiction of the court; pleaded a general denial, and attacked the deeds of trust as void on their face, and as not having been accepted by the trustee or preferred creditors, and as having been made with the intent to defraud the unpreferred creditors of the firm, of which fraud they alleged the trustee and preferred creditors had knowledge. The specific objections urged to the deeds were that a provision allowing the trustee to compound and compromise doubtful debts due the makers was erased from the first deed before filing, as well as one authorizing each of the makers to make further assurances of title and transfer with the same effect as if made by each in person. That the makers of the first deed had, a short time prior to its execution, represented to two commercial agencies that

Statement of the Case.

they were solvent, and had thereby deceived the defendant company into selling them a large amount of goods on credit; that the deeds conveyed property exceeding in value the debts secured; that the claims provided for in the deeds were also secured by solvent indorsers; that the makers had, not long before the execution of the first deed, conveyed to L. Fellman a large amount of real estate for a feigned consideration and in secret trust for themselves, and for the purpose of removing the same from the reach of their creditors, and had conveyed to others a large amount of assets to hold for their benefit; that they had made to H. Kempner a deed of trust to secure a pretended debt; that the makers of the deeds had, long prior to their execution, and whilst insolvent, entered into a conspiracy with L. Fellman, who was indorser on a large amount of Freiberg, Klein & Co.'s paper, and, with other persons, to remove the then present embarrassments of the firm and to continue business; and then, after enlarging their stock by purchases to a sufficient amount, to fail, and secure Fellman and other home creditors, and that the deeds of trust were the result of this conspiracy.

The plaintiff replied, denying the allegations of the answer, and alleging acceptance of the deed of trust before levy of the attachment. Upon the trial it was shown that the deeds of trust under which Sonnentheil claimed were duly executed; that the first was duly filed for record, and that Sonnentheil was in possession of the property as trustee at the time the second deed was executed; that the debts preferred in the deeds amounted to about $140,000, all of which, except $10,000, were secured by the accommodation indorsement of Fellman & Grumbach, and none was secured otherwise; that several of the creditors had accepted the deed of trust before the levy of the attachment, and some of the secured debts were paid thereafter.

The jury returned a verdict for the defendants, whereupon the case was taken by the plaintiff to the Circuit Court of Appeals, and the judgment of the court below was there affirmed. 41 U. S. App. 491. Thereupon the plaintiff sued out a writ of error from this court.

*Mr. A. H. Willie* and *Mr. J. M. Wilson* for plaintiff in error.

*Mr. F. Charles Hume* for defendants in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

1. At the last term of this court motion was made to dismiss the writ of error upon the ground that under section 6 of the act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals, the judgment of the Court of Appeals affirming the judgment of the Circuit Court was final. By this section the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction depends entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States. In this case the plaintiff Sonnentheil was a citizen of the State of Texas; the defendant Brewing Company was a corporation created by the laws of Ohio, and a citizen of that State, and Dickerson a citizen of the State of Texas; but it also appears upon the face of the original petition that Dickerson was marshal of the United States for the Eastern District of Texas, and that he made the seizure of the goods in question through his deputy, John H. Whalen, and under a writ of attachment sued out by the Brewing Company against Freiberg, Klein & Co. as defendants. It thus appears that the jurisdiction of the Circuit Court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company, but upon the fact that one of the defendants was marshal of the United States, and was acting in that capacity when he seized the goods in question.

Had the action been brought against the marshal alone there can be no doubt that the Circuit Court would have had jurisdiction of the case as one arising under the Constitution and laws of the United States. *Feibelmann* v. *Packard*, 109 U. S. 421; *Bachrack* v. *Norton*, 132 U. S. 337. It is true that in these cases the action was against the marshal and

the sureties upon his bond, but there is no difference in principle. The right of action in both cases is given by the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character. *Bock* v. *Perkins*, 139 U. S. 628; *Buck* v. *Colbath*, 3 Wall. 334; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593. If suits against a bank or railways chartered by Congress are suits arising under the laws of the United States, as was held in *Osborn* v. *U. S. Bank*, 9 Wheat. 738, and in *Pacific Railway Removal cases*, 115 U. S. 1, with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category.

The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one*, and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different States. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not *wholly* dependent upon either consideration. Had the jurisdiction of the Circuit Court been originally invoked solely upon the ground of diversity of citizenship as applied to the Brewing Company, the case would have fallen within the *Colorado Central Mining Company* v. *Turck*, 150 U. S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application.

The record contains twenty-three assignments of error, most of which it will be unnecessary to consider separately. For the purposes of this decision they are reducible to three.

2. Several of these assignments are based upon an alleged error of the court in submitting to the jury the question whether the deed of trust was accepted by any of the preferred creditors before the levy of the attachment.

Opinion of the Court.

Under the laws of Texas it is conceded that the instruments in question were deeds of trust, in the nature of chattel mortgages, under which the proceeds of the property sold were, after paying expenses, to be appropriated to the payment of the debts enumerated in the deeds, and any surplus remaining to be turned over to the makers of the instrument, and that such a deed of trust must be accepted by some *bona fide* creditor secured therein in order to give it effect.

In this connection the plaintiff requested the court to charge that "the deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, *bona fide* debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent."

This the court refused, and in lieu thereof charged that the deed, upon its face, was a legal instrument; that it differed under the laws of Texas from an assignment in the fact that an assignment presumes that "all the creditors named accepted it. In order to make a deed of trust operative it is necessary that the parties for whose benefit it is made should accept it. It is not necessary that the acceptance should be in writing, nor is there any particular form of acceptance. By the term 'acceptance' it is simply meant that when they understand what has been done, they consent to it; they agree to it, no matter in what form that may be done. Anything that shows that after being informed of what has been done, that with a knowledge of these facts, they assent to it, or they agree to it, constitutes and is, in fact, an acceptance. . . . I hold as a matter of law that if you find as a matter of fact that if *any creditor* accepted the terms of this instrument before the levy of the attachment, and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed that the entire property named in this deed

passed to the trustee, and in this action he may recover for whatever it is shown the property was worth at the time and place it was taken."

To the charge as thus given exception was taken upon the ground that it left the question of the acceptance of the deed of trust by the beneficiaries to the determination of the jury, when such acceptance was a question of law which should have been determined by the court; that the entire and uncontradicted proof showed that before the levy of the attachment, the deed of trust had been accepted by a portion of the beneficiaries named therein, and also by the trustee, and that there was no question of fact for the jury to determine.

The evidence upon this point was that the deed was made on December 16, 1892, and filed in the county clerk's office the same night, and that the goods were seized by the marshal under the attachment of the Brewing Company on December 23; that one Fry was one of the creditors secured in the deed; that he was informed of the deed of trust the night it was executed, and that he was secured in it. He answered that it was all right, and repeated the same thing next day.

Of the firm of Adoue & Lobit, who were also *bona fide* creditors secured by the deed, Adoue testified as follows: "The assignee, Sonnentheil, came to our office in the morning before twelve o'clock and told me that we were one of the secured creditors in the trust deed, and he would expect me to give him my assistance in the management of the business. I said I would, and for that purpose he would call a meeting later on. That was my notice of the failure. I answered him in a few words. Cannot exactly recall them. I said it was all right; very glad he was assignee; hoped we would get our money back. I attended two or three meetings. . . . I did more than indicate my acceptance of the security that was given me by the deed of trust. We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it; that was my idea."

Lobit, his partner, testified as follows: "When I learned of the failure I also learned that the notes which we held were secured by the deed of trust. This I also learned from the

newspaper. I also talked with Moses Freiberg a few days after the deed of trust was made. He regretted the failure and was sorry. I told him that I was satisfied, inasmuch as they had protected us in the deed of trust, and that I supposed they had done the best they could, and we were satisfied with it."

One Marx, the Galveston agent of S. A. Walker, a creditor of the firm, also testified: "I learned of it next morning after it occurred. Did not know of it before. I talked to Fellman about the deed of trust. He was endorser of Walker's paper; did not talk particularly to any member of the firm of Freiberg, Klein & Co.; I accepted under the deed of trust, probably the next day, I think to Joe Seinsheimer. I assented to the deed of trust securing Walker. I was authorized to do so for Walker."

Of course, if the acceptance had been in writing, the construction of such writing would have been a question for the court. With reference to parol understandings, the rule is that if there be any conflict as to the words used, or if the words themselves be ambiguous, the question of intent must be left to the jury. Notwithstanding the testimony of these witnesses was so positive to the effect that they accepted the trust, we are of opinion that it was not improper to submit the question to the jury. In its charge the court instructed the jury that the creditors who accepted the deed of trust must themselves be free from the taint of fraud, and the question of fraud was so connected with that of acceptance that it was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, *Lomer* v. *Meeker*, 25 N. Y. 361, 363; *Elwood* v. *Western Union Tel. Co.* 45 N. Y. 549, 553, the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.

*Munoz* v. *Wilson*, 111 N. Y. 295, 300; *Dean* v. *Metropolitan Elevated Railway*, 119 N. Y. 540, 550; *Canajoharie Bank* v. *Diefendorf*, 123 N. Y. 191, 200; *Volkmar* v. *Manhattan Railway*, 134 N. Y. 418, 422; *Rumsey* v. *Boutwell*, 61 Hun, 165, 168; *Roseberry* v. *Nixon*, 58 Hun, 121; *Posthoff* v. *Schreiber*, 47 Hun, 593, 598.

3. Upon the trial it was insisted that the deeds were void upon their face, but the court held them to be valid, and we see no reason to question the correctness of its conclusion. Upon the question of actual fraud, which was the main issue in the case, the court charged the jury as follows: "If you find from the evidence that any one creditor had accepted the deed of trust before the levy of attachment, and that such creditor was not guilty of fraud himself and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff; but on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find for the defendant."

This instruction was excepted to by the plaintiff upon the ground that it left to the jury the fact whether any of the creditors had knowledge of the fraudulent intent — if any there were — in the making of the deed of trust, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of any such fraudulent intent — if it existed — or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence; but, on the contrary, the uncontradicted evidence was that they had no knowledge of any such fraud, if any there was, or of any fact that would have put them upon inquiry with reference to the same.

With regard to the question of fraud in fact there was considerable testimony, but it was insisted by the plaintiff that,

so far as concerned the creditors who accepted the deed of trust, there was not a scintilla of evidence tending to show either direct knowledge of the fraud, or such information as would put a reasonably prudent person upon inquiry as to the existence of such fraud.

It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. So much depends upon the character of the business transacted by the insolvent firm, the circumstances under which the deeds are executed, the relation of the parties to one another and to the preferred creditors, the manner in which the business is subsequently conducted, the opportunities the preferred creditors had of informing themselves of the facts, that it is rarely safe to withdraw the question from the jury. Parties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of the fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value.

The testimony in this case indicates that as early as February, 1891, it had been discovered by Freiberg that the firm had lost considerable sums of money through Seinsheimer, one of the partners, and was in an embarrassed condition; and arrangements were made with the principal creditor of the firm, a kinsman of Freiberg, by which it was hoped to extricate themselves. This proving ineffectual, a meeting was called at the residence of one Fellman, in Galveston, which was attended by the members of the firm and by Fellman, Kempner and Grumbach, indorsers for the firm. Seinsheimer and Grumbach married sisters and were sons in law of Fellman; Kempner was a brother in law of Seinsheimer. At the time of this meeting Fellman and Grumbach, who were part-

ners in the dry goods business, were indorsers for Freiberg, Klein & Co. to the extent of $135,000. At this and other meetings which were held, the question of the solvency of the firm, and the means which should be used to protect it from failure, were considered, and arrangements were made to reduce their debts so that they could continue business. After these meetings the firm continued business as before, buying and selling goods for cash and upon credit. At these meetings it was determined that the firm should endeavor to carry on their business, but if it had to fail that Fellman should be protected at all hazards. There was also evidence to the effect that a short time prior to the failure Fellman promised to buy out their goods and let them carry on the business in his name. The testimony also tended to show that before making the deeds, a conveyance of land for something less than its value was made by the firm to Fellman for cash paid by him. Also that Seinsheimer, one of said firm, had kept from the trustee some of the bills receivable by the firm, but that the trustee, upon finding this out, had made him turn the bills over to him.

In March, 1891, a request for a report of the financial condition of the firm by a commercial agency was answered by a statement, made under the direction of Seinsheimer, showing that the assets of the firm exceeded its liabilities by $200,000, when in truth the firm was insolvent. The business of the firm was continued by the purchase and sale of goods, and the Fellman indorsements were continued by extensions and renewals.

In February, 1892, it was discovered that the firm was hopelessly insolvent, but another call from the commercial agencies for an annual report was again met by a false statement, showing assets in excess of liabilities of more than $200,000. Fellman, Grumbach and Kempner had full notice from members of the firm of all these matters.

In the summer of 1892 the failure of the firm became evident, and goods were purchased and placed in stock, with a knowledge that they could not be paid for. The credits of the firm were restricted; in some instances entirely cut off, and rumors of its insolvency circulated throughout the com-

munity. The dangerous condition of the firm became a matter of discussion among business men in Galveston, and inquiries continued to be made from abroad of the local commercial agencies as to their solvency. A demand was again made by a commercial agency in September, 1892, at the instance of the defendant Brewing Company, and was answered by another statement, showing an excess of $200,000 over all liabilities; and the Brewing Company was thereby induced to extend a further credit to the firm.

Notwithstanding the apparently desperate condition of the firm, during the months of September, October and November and up to the 16th day of December, 1892, the day of its failure, the firm made large purchases upon credit, and, early in December, Fellman, who was then in New York, was called home to participate in and direct the business. He came immediately and assumed the practical superintendence of affairs. Upon consultation with attorneys, he had the original purpose of the firm to transfer its property directly to him changed to a trust deed in favor of the creditors whose paper he had endorsed. At his request Sonnentheil, a relative of his wife, was employed as trustee, at a salary of $150 per month. He had been a business man in Galveston, but was without knowledge or experience in the particular business for which he was selected. A deed of trust was thereupon executed to Sonnentheil, as trustee, to secure home creditors and two who were not home creditors, already secured, save in a few and relatively unimportant instances, by the indorsements of Fellman and Grumbach. The property covered by the deed of trust, which exceeded in value the secured debts by about $75,000, was turned over to the trustee in pursuance of an arrangement between the firm and Fellman that the business should be continued either in Fellman's name or in the name of some one else, until a settlement could be obtained, when it was to revert to the firm.

The possession of the trustee consisted in his having the key to the storehouse in which the goods were situated, and in attending at the store some hours every day. He signed all the letters and checks, and kept control of the general

cash. The three members of the firm were each employed at a salary of $300 per month, Seinsheimer as correspondent. He also had the keeping of the daily cash receipts. The other two acted as collectors. All the employés of the firm, including the drummers, were retained in their respective positions, and at their former salaries. The firm's sign, prominently displayed over the door of the storehouse, was not removed. The business (exclusive of the purchase of goods) was conducted, with the consent of the beneficiaries, in the usual way by selling in small parcels, sometimes on credit and sometimes for cash, to the regular customers of the firm. Such customers consisted largely of barrooms throughout the State of Texas, and the purpose of the trustee was in accordance with the wish of the beneficiaries to keep these barrooms going in the usual way by selling them goods on time, so as not to interrupt their usual business, and gradually collect what they owed.

The books of the firm, the trustee claimed, were in his charge, but he admitted that all entries made in the books after the date of the failure were made therein by Seinsheimer, and not under his (the trustee's) direction, but in his capacity as a member of the firm. In fact, he claimed to be ignorant of such entries, although they showed that the books had been regularly kept just as though no change had been made in the ownership of the property.

While there is nothing in all this which proves either direct knowledge of the fraud to the accepting creditors, or positive knowledge of facts which necessarily put them upon inquiry, there is a strong probability that these creditors, who were all business men resident in Galveston, were possessed of the same information that others had regarding the failing condition of the firm. As one of the witnesses stated: "Rumors were afloat that they were slow in payments, owing largely to banks and individuals; credit refused them in some quarters, and generally that their business was not healthful. Inquiries as to the financial standing of the firm came from Northern and Eastern cities, local banks and firms. There were rumors in Galveston, general in their character and dis-

cussed among brokers, banks and merchants." It is scarcely possible that these rumors could have escaped the ears of their local creditors. It is not improbable that the peculiar relationship of the firm to Fellman was known to these creditors, as well as the fact that the assignment was intended primarily to protect Fellman; and secondarily to secure a settlement with the creditors upon terms favorable to the firm, and the subsequent return of the property to them. It is by no means impossible that they knew that the firm were making large purchases of goods on credit just before their assignment; that false representations had been made to commercial agencies of their financial standing; that the debts secured by the deed of trust were already secured by Fellman's indorsement; that the firm still remained in open possession of the stock and practically retained direction of the business, and that to the public at large there was no apparent change in its conduct or headship. Under the peculiar circumstances of this case it was not error to submit this question to the jury, and there is no criticism to make of the charge of the court in that particular. Indeed, in another case arising out of the same failure the Supreme Court of Texas held that the question of fraud was properly left to the jury. *Sonnentheil* v. *Texas Guaranty & Trust Co.*, 30 S. W. Rep. 945.

4. Error is also assigned in admitting the statement of one Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deeds of trust, in which Freiberg is said to have asked Werner, as agent of the Moerlein Brewing Company, to give him, Freiberg, the agency for the sale of the beer, saying that "after they got a settlement they would go right ahead; the beer would not change hands at all; go to the same customers; and that the firm was in such a shape that they had to fail." This evidence was objected to upon the ground that it related to statements made by the firm after the execution of the deeds of trust, and was not known or assented to by the trustee or the beneficiaries of the trust deed, and was incompetent to affect their interests.

Werner, the witness, was agent for the Brewing Company,

living in Cincinnati. Hearing of the failure, he left home and reached Galveston three or four days after the assignment. He went immediately to the office, and met Seinsheimer and Freiberg. At this interview Freiberg made the statement in question. There is no doubt of the general proposition laid down by this court in *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161, that in an action by the vendee of personal property against an officer attaching it as the property of the vendor, declarations of the vendor to a third party, made after the delivery of the property, are inadmissible to show fraud or conspiracy to defraud in the sale, unless the alleged collusion be established by independent evidence, and the declarations fairly form part of the *res gestæ*.

The same question was again considered in *Jones* v. *Simpson*, 116 U. S. 609, in which declarations of the vendor made after delivery of the property to the vendee, but on the same day and fairly part of the *res gestæ*, were held to be admissible to show intent to defraud the vendor's creditors by the sale, it being also shown by independent evidence that the vendee shared the intent to defraud with the vendor.

In the case under consideration there was independent evidence that the vendors, Freiberg, Klein & Co., and the vendee, Sonnentheil, were engaged in a common purpose to defraud the creditors of the vendors, and the declarations in question were not mere admissions of what had already taken place, but were propositions for a further continuance of business with the Brewing Company, upon a basis which indicated that after they had obtained a settlement with their creditors, they would assume their ownership and charge of the stock and continue business as they had done before. While the propriety of admitting these declarations as against the plaintiff Sonnentheil and the secured creditors may be open to some doubt, it is entirely clear that they were admissible against Freiberg, Klein & Co., and the rights of the secured creditors were so carefully guarded in the charge to the jury that we think no harm could have resulted from allowing the jury to consider them.

We have examined the remaining assignments of error, of

which there are a large number, but the disposition we have made of the others renders it unnecessary to consider them. While the propriety of some of the rulings may admit of doubt, the objections made were extremely technical in their character, and the majority of the court are of opinion that no error was committed prejudicial to the plaintiff and to the secured creditors, and that the judgment of the Circuit Court of Appeals must therefore be

*Affirmed.*